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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

HIGGINS *v.* HIGGINS (THE KING'S PROCTOR SHEWING CAUSE).

1909
Oct. 19, 20, 21, 22, 28.

Divorce — Practice — Costs — King's Proctor — Unsuccessful Intervention — Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 2—*King's Proctor not condemned in the Petitioner's Costs.*

The Court (Sir John Bigham, President), following an alleged practice as to costs in cases where the King's Proctor unsuccessfully shewed cause against decrees nisi being made absolute, declined to condemn the King's Proctor in the costs of a successful petitioner, against whose conduct nothing was proved.

THE petitioner (husband) having obtained a decree nisi dissolving his marriage with the respondent, the King's Proctor intervened to shew cause why the decree should not be made absolute, and in his plea charged the petitioner with cruelty and adultery.

The petitioner in due course filed an answer, denying the charges, and, after a hearing before the President extending over nearly four days, the intervention was dismissed, the learned

1909

HIGGINS v. HIGGINS.

President, in dismissing it, stating that the King's Proctor had ample justification for intervening.

C. F. Gill, K.C., and *W. O. Willis*, for the King's Proctor, thereupon asked that the intervention should be dismissed without costs, and suggested that the only case in which the King's Proctor had been deprived of costs was *Westcott* v. *Westcott* (1), which was tried before a jury, who stopped the case, the learned judge stating thereupon that he would have stopped it sooner, if sitting without a jury. That, it was suggested, distinguished the present case. They also referred to *Hunter* v. *Hunter* (*The King's Proctor shewing Cause*) (2) and to two unreported cases, namely, (1903) *Howard* v. *Howard and Drew* (*The King's Proctor shewing Cause*) and (1908) *Hilbinger* v. *Hilbinger* (*The King's Proctor shewing Cause*).

Barnard, K.C., and *Bayford*, for the petitioner. *Westcott* v. *Westcott* (1) absolutely covers this case. The petitioner ought to have an order for costs against the King's Proctor. He has had great difficulty, financially, in opposing this intervention. If the argument on the other side were to prevail, it would nullify the effect of the Matrimonial Causes Act, 1878, s. 2, which gives the Court an absolute discretion as to the costs of all parties to an intervention.

Cur. adv. vult.

1909. Oct. 28. BIGHAM P. I have now had an opportunity of examining the authorities. I understand that it is not the practice of this Court to give costs against the King's Proctor, even though the intervention fail. That may work very great hardship against the petitioner; indeed, it may ruin him, as it probably will in this case. This petitioner was saddled with a drunken, dissolute, and unfaithful wife, and he brought his suit to obtain a divorce from her. He had to find the money to

(1) [1908] P. 250. [Neither the report in the *Law Reports* nor that in the *Law Journal* reports was cited to the learned President, and the only reference brought to the attention of the Court by counsel on either side was one in the *Times* newspaper.] See *Carter* v. *Carter* (*The King's Proctor intervening*), [1909] W. N., 239; and post, p. 4.

(2) [1905] P. 217.

prosecute his suit, and he had to pay his own costs, although he was successful. Moreover, he had to provide the money to enable his wife to defend this undefended suit—for so it was—and those costs, of course, he can never recover.

After the decree nisi was pronounced, some one put the King's Proctor upon inquiry, with the result that the King's Proctor obtained evidence which amply justified him, in my opinion, in intervening. Nothing can be said against the course which the King's Proctor took. In taking that course he was discharging a public duty which the Legislature has placed upon him; not only was he justified in commencing, and bound to commence, his intervention, but in prosecuting it he did no more than was right.

The King's Proctor acts in the interests of the public, and the public are, apparently, not bound to pay for the great wrong which is done, in a sense, to the petitioner who resists the intervention. It is true that where the King's Proctor is ordered to pay costs he may apply to the Treasury, and, if the Treasury think fit to do so, they may, out of the public purse, refund him the costs that he has been put to; and it may be that if I were to order the King's Proctor to pay these costs—the costs of the petitioner—the King's Proctor would be able to obtain them. I do not know whether that is so or not; and I do not wish to form any opinion upon it, for I never know what the Treasury will do.

But I have said that hitherto my predecessors have apparently looked on cases of this kind as cases in which, if there is no reason at all to blame the King's Proctor, the King's Proctor ought not to be ordered to pay the costs. I do not think I can depart from that practice, and although I sympathize with the petitioner, who is ill able to afford the great expense which this long hearing has involved him in, I do not think I am entitled to regard the hardship of the case as a reason for departing from the practice.

This intervention is therefore dismissed without costs.

Barnard, K.C., asked for leave to appeal, in case such leave were necessary.

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BIGHAM P. You may have leave, in case it should be necessary. An important question of principle is involved.

Solicitors for petitioner: *Smith, Rundell & Dods, Agents for Evan Davies, Cardiff.*

The King's Proctor.

H. D. G.

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Nov. 5, 8, 9, 10, 15.

CARTER *v.* CARTER (THE KING'S PROCTOR INTERVENING).

Divorce — Practice — Costs — King's Proctor — Unsuccessful Intervention — Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 2—*Discretion— King's Proctor condemned in Costs.*

Upon an intervention under s. 2 of the Matrimonial Causes Act, 1878, the King's Proctor, as representing the public, is in precisely the same position as any member of the public who intervenes, save that, by the proviso contained in the said section, the Treasury may—and in practice always does—recoup the King's Proctor in respect of any costs which he may pay to a successful petitioner under order of the Court.

The section confers upon the Court an unfettered discretion as to costs.

Westcott v. *Westcott*, [1908] P. 250, approved and followed.

Higgins v. *Higgins*, [1909] W. N. 214 (reported ante, p. 1), discussed and not followed.

THIS was an unsuccessful intervention by the King's Proctor in a wife's suit for divorce.

The respondent entered an appearance, but did not defend the suit.

Barnard, K.C. (*Bayford* with him), for the petitioner, asked that the King's Proctor should be ordered to pay the costs of the petitioner upon the intervention.

Lewis Thomas, K.C. (*Rowan-Hamilton* with him), for the respondent, asked that the order should be made; otherwise the heavy costs of the intervention would fall on the respondent.

Rawlinson, K.C. (*W. O. Willis* with him), for the King's Proctor, opposed, and read from what he stated to be a short-hand note of the judgment of the ex-President (Sir Gorell

Barnes) in an unreported case of *Howard* v. *Howard and Drew* (*The King's Proctor shewing Cause*) in 1903. The point has been decided by the President (Sir John Bigham) quite recently in *Higgins* v. *Higgins* (*The King's Proctor shewing Cause*). (1)

Barnard, K.C., in reply. When *Higgins* v. *Higgins* was argued the attention of the President was not called to the report of *Westcott* v. *Westcott* (2) in last year's *Law Reports*. The only reference to that case was from *The Times* newspaper. The Court has full power, in the exercise of its discretion, to condemn the King's Proctor in costs.

BARGRAVE DEANE J. I think it a grievous oppression if the King's Proctor can bring petitioners into Court and in no case be condemned in costs. I will look into the question, in view of the recent, and apparently conflicting, decisions.

Cur. adv. vult.

1909. Nov. 15. BARGRAVE DEANE J. This is a case which I decided the other day, but reserved the question of costs. I reserved it chiefly because there appeared to be conflicting authorities, which I wanted to look into with a view to seeing to what extent I was bound by them, or either of them.

I had better state shortly the nature of the proceedings as they affect my mind in dealing with this question.

In the original suit, brought by the petitioner, Mrs. Carter, against her husband, the respondent, who did not defend it, a decree nisi was pronounced on July 24, 1908, on the grounds of desertion and adultery, the charge of cruelty in that petition not being proceeded with.

The King's Proctor filed his plea in that suit on February 4, 1909, shewing cause why the decree should not be made absolute, and alleging (1.) that material facts had not been brought to the knowledge of the Court; (2.) that at the hearing of that suit a false case was presented to the Court on behalf of the petitioner for the purpose of obtaining a divorce contrary to the justice of the case; and (3.) that the petitioner falsely alleged that the

(1) [1909] W. N. 214; reported ante, p. 1. (2) [1908] P. 250

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respondent had deserted her on and since the 10th day of January, 1906, whereas in truth and in fact the petitioner and respondent continued to live together in the same house at Cookham from that date until October, 1907, except for short periods when the respondent was away on business.

That came before the President (Sir J. C. Bigham), the petitioner's solicitor having meanwhile communicated with the King's Proctor, stating in effect that she had put forward the allegation of desertion under a misapprehension, and that she withdrew that charge. Thereupon the decree nisi was rescinded and the petitioner was ordered to pay the costs of the King's Proctor. I am told that she has since paid those costs. Counsel for the petitioner appears to have intimated, at the time when the decree nisi was rescinded, that the petitioner desired to keep upon the file that petition containing the original charges of cruelty and adultery, and to have leave to amend by adding further charges; and under those circumstances it was desirable to know whether the adultery need be proved over again. The act of adultery in question was at a certain hotel in the Edgware Road, London. The President thought, under the circumstances, that it was better that it should be proved afresh, and that counsel for the King's Proctor should watch the case when it came before the Court again.

The amended petition, in addition to the former charges of cruelty and adultery, contained extra charges under both heads.

The King's Proctor, upon the fiat of the Attorney-General, and after obtaining leave, intervened, and in his plea, which was filed on June 23, 1909, alleged (1.) that the petitioner and respondent "are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case"; (2.) "that divers material facts concerning the conduct of the petitioner and respondent have not been brought to the knowledge of the Court"; (3.) "that the respondent is not guilty of desertion as alleged in the said petition"; (4.) "that the respondent is not guilty of cruelty, as alleged in the petition, amended petition, and re-amended petition"; and (5.) "that the respondent is not guilty of adultery, as alleged in the said

petition and re-amended petition." The plea concluded with a prayer for the dismissal of the petition and for the condemnation of the petitioner and respondent in the costs of the King's Proctor.

We have, therefore, a new charge of desertion and of adultery, and we have also the proof of charges of cruelty which were not necessary to be proved in the former case.

I have found as a fact that the King's Proctor has failed to prove collusion and that the petitioner has established the charges of cruelty and adultery. Upon those findings I have given her a decree nisi, and I have now to determine the question of costs.

The King's Proctor's position is peculiar. He in fact represents the public, and his duty is to see that nothing is done contrary to public interests in suits for dissolution or nullity of marriage. He is an officer of the public, and he intervenes under the Matrimonial Causes Act, 1878, and especially under s. 2 of that Act. (1) That is the section which applies to this question of costs, and, as I read it, it puts the King's Proctor in exactly the same position as any other litigant in this Court. He represents the public, any member of whom is, by virtue of this statute, entitled to intervene. Whereas formerly the King's Proctor was only allowed to intervene on the ground of collusion, he can now intervene on any ground which is open to any member of the public. But he is protected against personal condemnation in costs by the provision in the Act which says that the Treasury may recoup him, as part of the expenses of his

(1) 41 & 42 Vict. c. 19, s. 2, is as follows: "Where the Queen's Proctor or any other person shall intervene or shew cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or shew cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or shewing cause as aforesaid as may seem just; and the Queen's Proctor, any other person as aforesaid, and such party or parties shall be entitled to recover such costs in like manner as in other cases: Provided that the Treasury may, if it shall think fit, order any costs which the Queen's Proctor shall, by any order of the Court made under this section, pay to the said party or parties, to be deemed to be part of the expenses of his office."

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office, for any costs he may incur through any order of the Court made under the section. There seems to have been in some of the earlier cases an idea prevalent that if the King's Proctor shall have acted properly, reasonably, and straightforwardly he is not to be the sufferer. As I read it, that means that he personally is not to suffer, because the Treasury may reimburse him. Herein lies the difficulty; and a case was decided only the other day, which I will refer to presently. But before I do so I will take two less recent cases. In a case of *Howard* v. *Howard and Drew* (1), I have been furnished with a typed note of what I understood Mr. Rawlinson to say was a transcript of the shorthand note of the judgment dated February 4, 1903, as to costs, but which is, in fact, only a verbatim copy of the *Times* newspaper report. It is as follows: "Sir Gorell Barnes, in giving judgment, said that the case had lasted the best part of four days, and both sides had been fully heard. The substance of the King's Proctor's case was that the petitioner gave way to habits of intemperance and treated the respondent with great cruelty, and, by keeping her and her children without food, drove her into her mode of life; or at any rate that the petitioner knew what she was doing to earn her living and acquiesced in it. He (the learned judge) thought that the whole question turned upon the character of the husband. A very large body of evidence had been called on behalf of the King's Proctor, and the respondent had said that the petitioner was a drunken man. That charge was, to his mind, entirely disproved. The wife had also alleged that, from first to last, her husband had treated her very cruelly; yet she had never made any application to the justices for protection, as she could have done if she had chosen. He could not accept the view that she was literally driven on to the streets by starvation. She, herself, had given way to intemperance; though, as she said, it was through ill-treatment and worry. The view that he took was that money was given to her to get food with, but that she did not spend it in the right way. With regard to connivance, he thought it was not clear that the wife had gone wrong before the petitioner went to South Africa, and he did not think it had been shewn

(1) (1903) Unreported.

that the petitioner had any knowledge of what was going on. As the King's Proctor had failed to make out his plea, the intervention must be dismissed; but, as it was the duty of the King's Proctor to interfere and lay the facts before the Court on his being so advised by the Attorney-General, unless he acted unreasonably he ought not to be condemned in costs; and it could not be said, in this case, that he had acted unreasonably in intervening. The intervention would, therefore, simply be dismissed."

This note of that case would seem to suggest that in no case can the King's Proctor be condemned in costs unless he has acted unreasonably. Such a suggestion, if accepted, would make the statute a dead letter.

Then I come to another case, decided by the same learned judge in 1908, in which the same question as to costs arose. This is fully reported in the *Law Reports* and in the *Law Journal* reports. The late President, after reading the section of the Act, said in his considered judgment in that case (*Westcott* v. *Westcott* (*The King's Proctor shewing Cause*) (1)): "Now I think the terms of that section leave the question of costs entirely to the discretion of the Court, and that that discretion must be exercised in accordance with those three or four words that I emphasized, namely, 'as may seem just.' Having now looked through the notes of the cases which were commented on in the course of the arguments, I do not think that the cases really help one at all. The exercise of discretion in one case is very little guide to the exercise of discretion in another case. If these cases are looked through, I think we may generally discard from consideration one matter altogether—that is, any case of unreasonable action on the part of the King's Proctor. As I observed in the course of the arguments, the King's Proctor acts on the advice of the Attorney-General and looks up the case as well as he can, and a very difficult task he has, because he has to find out witnesses under very difficult circumstances, and it is not likely that cases will occur in which it can be shewn that the King's Proctor has acted unreasonably. But the argument on the part

(1) [1908] P. 250, 252.

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of the King's Proctor amounts substantially to this—that, that being so, the King's Proctor, unless he acts unreasonably, cannot be, or at any rate ought not to be, condemned in the costs. I cannot agree with that view, because it would lead to the result that in no case practically (I do not say in no case at all) could the King's Proctor be condemned in costs, because it may generally be assumed that he is not likely to act unreasonably, so far as his own action is concerned, in getting up a case. But the difficulties the King's Proctor has in getting up such a case shew—and experience teaches one—how very often witnesses may very much mislead the King's Proctor and not come up to what is expected from them when their proofs are taken, and, if so, a case may completely fail against a petitioner notwithstanding the utmost exercise of care and reasonable diligence and proper action on the part of the King's Proctor, because he has to look into matters to which he was not an original party, and to get to know all these things, and he must take it from the information of somebody else. Now, if the view presented by the King's Proctor is correct, there would be practically no case in which an order could be made against the King's Proctor. But it is quite clear, from the terms of the Acts which govern these cases, that it is not intended to exclude from consideration of what is just cases in which the King's Proctor, although acting reasonably, is in fact unsuccessful; and, when the cases which have been cited to me are looked through, it will be found difficult from the reports to ascertain exactly all the details of the cases, and all that has weighed with the judges, so far as the conduct of the petitioner in each case is concerned. But, looked at roughly, I think the conclusion to be drawn from those cases in which no order has been made, and in which the party has been left to bear his own costs—I say looked at roughly, because one cannot follow all the details, especially when documents are referred to in the course of the reports, but are not set out—I think it will be found that there is something in the conduct of the petitioner, or something in the way in which the facts have been presented to the Court by the petitioner, in which there was, in effect, a reason for the intervention through something which the petitioner had done."

Then the learned President (Sir Gorell Barnes) goes on to deal with a reported case of *Hunter* v. *Hunter* (*The King's Proctor shewing Cause*) (1) and with some aspects of the case then under consideration, and in the concluding paragraph of the judgment he says: "I think I ought to exercise my discretion in favour of the petitioner and give her an order that her costs be paid by the King's Proctor. Therefore the intervention will be dismissed, and the costs will be paid by the King's Proctor."

That is inconsistent with what he appears to have decided in the earlier case, five years before. I have, therefore, to find out for myself what is the true course to pursue in dealing with this question of costs. Only the other day the President (Sir John Bigham) dealt with a similar question in the case of *Higgins* v. *Higgins* (*The King's Proctor shewing Cause*) (2), but I learn that the only reference which was given to him of the case of *Westcott* v. *Westcott* (3) was that in *The Times* newspaper. It is manifest that he cannot have had before him the report of this case in the *Law Reports*. The President said (2): "I have now had an opportunity of examining the authorities. I understand that it is not the practice of this Court to give costs against the King's Proctor, even though the intervention fail."

That is absolutely opposed to the considered judgment of the late President, as reported in the *Law Reports* (3) and the *Law Journal* reports. (4) What becomes of the words in the Act, "may make such order as to the costs . . . . *as may be just*," if the Court's power of doing justice is taken away from it by some assumed practice? I find no such practice myself; and I am glad to note that leave to appeal was given by the President. I thought, when this question was first raised before me the other day, that I might reserve my judgment until I might see the result of that appeal. But on consideration I have thought it right to deliver judgment to-day.

In the present case what has happened? The only matter in which the petitioner has been found at all in fault was in putting

(1) [1905] P. 217.

(2) [1909] W. N. 214; reported ante, p. 1.

(3) [1908] P. 250.

(4) (1908) 77 L. J. (P. & M.) 102.

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forward a case of desertion, which she subsequently admitted was a wrong case in law, although in fact there was, as she thought, desertion. She has suffered for that and had to pay the costs of the King's Proctor in the former intervention. The King's Proctor now says, in this new suit, that that desertion was the result of a collusive arrangement. There is absolutely no evidence of it, and I have found it is not so.

The King's Proctor obtained a second fiat of the Attorney-General, and he has thought fit, no doubt upon the materials supplied to him, to allege that there was collusion, not only in regard to the charge of desertion, but also in respect of the adultery. The adultery has been proved again, and, in my opinion, the suggestion that the solicitor's clerk who was put to watch the respondent was acting in collusion with the respondent has not been established. I think it is rather a large order for the King's Proctor to have attempted to prove collusion in that respect, though I do not say that he improperly charged it. Ought I to condemn the petitioner to pay the costs she has incurred in resisting this intervention, when everything alleged against her has failed? If I thought that there was anything in the petitioner's conduct deserving of blame or tainted with suspicion of her own bona fides, then I think this case might perhaps be said to have been brought within those cases where the King's Proctor was not condemned in costs. But, in the absence of any want of bona fides on the part of the petitioner, I cannot see that the King's Proctor is in any different position from that of any other litigant who brings charges in this Court and fails to prove them.

The only "just" order I can make in this case is that the King's Proctor pay the costs of the petitioner; and I have no doubt that he will recover them from the Treasury, who will be satisfied that he has done his duty.

I may add that I should not be sorry if this case were also to be carried to the Court of Appeal, so that the opinion of that Court might be expressed as to the true meaning of the words "as may be just." My interpretation of those words clearly is that the Legislature intended this Court to have an unfettered discretion in dealing with the question of costs in these cases of

intervention. In case it is necessary, and as I understand it is desired, I give leave to appeal.

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Solicitors for petitioner: *Braby & Waller.*
Solicitors for respondent: *Arthur Newton & Co.*
The King's Proctor.

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THE GLADYS.

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Oct. 27, 28; *Nov.* 3.

Admiralty—Collision—Sailing Vessel and Steam Trawler—"Proceeding"—Regulations for Preventing Collisions at Sea, 1897, *art.* 9 (1906), *sub-s.* (*k*); *art.* 20.

A steam trawler fishing in the daytime in the vicinity of the Dogger Bank, and indicating her occupation to an approaching sailing vessel by the display of a basket, in accordance with art. 9 (1906), sub-s. (*k*), of the regulations for preventing collisions at sea, was run into and sunk by the sailing vessel owing to the negligence of those in charge of that vessel in not keeping a good look-out. It was contended on behalf of the sailing vessel that, though she was to blame, the trawler was also to blame for not using her steam to keep out of the way of the sailing vessel under art. 20 of the above regulations, by which "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel":—

Held, that the trawler was not to blame, for, at the material time, she was engaged in the operation of hauling in her trawl. In such circumstances she was an incumbered vessel unable, until her trawl was up, to move her engines ahead or astern without risk of fouling her propeller. She was, therefore, not a steam vessel "proceeding" so as to involve risk of collision within the meaning of art. 20.

The Jennie S. Barker, (1875) L. R. 4 A. & E. 456, distinguished.

The Tweedsdale, (1889) 14 P. D. 164, followed.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steam trawler *Prome*, and the legal representatives of the late master and crew.

The defendants were the owners of the barque *Gladys*.

The case is reported on the question whether the word "proceeding" in art. 20 of the regulations for preventing

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collisions at sea, 1897 (1), is applicable to a steam trawler engaged in hauling in her trawl.

1909. Oct. 27, 28. *Horridge, K.C.*, and *Arthur Pritchard*, for the plaintiffs, the owners of the *Prome* and others.

Laing, K.C., and *H. C. S. Dumas*, for the defendants, the owners of the *Gladys*.

The facts of the case, the arguments of counsel, the cases referred to in the course of the hearing, and the relevant articles of the regulations for preventing collisions at sea, sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 3. THE PRESIDENT (SIR JOHN BIGHAM). This is an action by the owners of the steam trawler *Prome* and others against the owners of the barque *Gladys* to recover damages in respect of a collision between the two vessels, whereby the *Prome* was sunk with all hands.

The facts are in some dispute, but I have no difficulty in finding them. They are as follows: The *Prome* was a steam trawler of 141 tons gross and 44 tons net register with engines of 45 horse power nominal, and was manned by a crew of nine hands all told. The *Gladys* is a steel barque of 1362 tons gross and 1345 tons net register, and was manned by a crew of fifteen hands all told. At 9 o'clock on the morning of July 22 last the *Prome* was trawling with the Gamecock trawling fleet in the vicinity of the Dogger Bank. The wind was W.S.W., fresh, and the weather was fine and clear. The trawler was stationary, heading N.W. or N.N.W., and was engaged in drawing up her trawl on her port side. She was carrying a basket ball on her forestay, in accordance with the requirements of sub-s. (*k*) of art. 9 of the Order in Council of April 4, 1906, which relates to fishing vessels, and now forms part of the regulations for preventing collisions at sea. The material part of the sub-section reads as follows: "All vessels or boats fishing with nets or lines or trawls, when under

(1) Art. 20: "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen."

There was a dispute on this part of the case. It was said on the part of the *Gladys* that the operation of drawing up the trawl on the *Prome* was finished, and that the vessel was heading S.E. by E., and that no basket ball was exhibited; but I accept the evidence called on behalf of the plaintiffs on these points and I find the facts as I have stated them.

In these circumstances the *Gladys*, under all plain sail and steering N.E. by E. magnetic, and making eight or nine knots, approached. She reached within 100 or 120 feet of the trawler before any one on board became aware of the trawler's existence. The master of the *Gladys* then saw the masthead of the trawler just over his bow. He gave the order to put the helm hard-a-port, intending, if possible, to pass under the trawler's stern, but it was too late. The bow of the *Gladys* struck the port side of the trawler abaft the foremast, and in three minutes the trawler sank with all hands. After the collision all was done by those on board the *Gladys* that could be done. The trawler shewing her port side to the *Gladys*, it was right for the latter to put her helm hard-a-port and to try to get under the trawler's stern; but the evidence makes it quite clear to my mind that before the collision there was no look-out on the *Gladys*. The master says that he was on the poop keeping watch, and he says that by craning his neck he could see right in a line with the stem; but in point of fact he did not see straight in a line with the stem. The trawler was, and had been for an hour or more, straight ahead, and yet had never been seen during all that time by any one on board the *Gladys*. He says, further, that, without craning his neck, he could see anything within half a point or a point on either bow; but as he saw nothing I must assume that the trawler was not within his line of sight, but was right ahead and stationary. If she had been moving she must have come within his line of sight. The *Gladys* was down by the stern and the master was on the poop, so that he was unable to see anything ahead, even if he looked.

In my opinion no look-out at all was being kept on the sailing

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ship, or, if any, a very bad one. I am also satisfied that, if the trawler had been seen when she ought to have been seen, the helm of the *Gladys* would have been put to port in plenty of time to have enabled the *Gladys* to go under the trawler's stern, and so to have avoided the accident. The *Gladys* is therefore to blame for the disaster, but the question arises whether she is wholly to blame. Counsel for the defendants say "No," because, as they allege, it was the duty of the trawler to have used her steam and got out of the sailing ship's way. By art. 20 of the regulations for preventing collisions at sea (steering and sailing rules) it is provided that "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel." But in applying this rule the facts of the case must be kept in mind. The trawler had her trawl still out, though she was engaged in the operation of hauling it in. She was thereby rendered stationary, and was as if she were an anchored ship. The evidence shews that in this condition she could neither go ahead nor astern. The trawl being close aboard, she could not have moved her engines ahead without risk of fouling her propeller, and if her engines had been moved astern, she would probably have fallen off head on to her trawl in an unmanageable position. She was an incumbered vessel and practically, until her trawl was up, immovable. In my opinion a vessel so placed cannot properly be said to be "proceeding" within the meaning of art. 20. The case of *The Jennie S. Barker* (1), relied on by counsel for the defendants for the purpose of shewing that the trawler was a "proceeding" ship, is not applicable. There a tug was hove to in a fairway channel waiting for employment. She could have moved out of the way of the approaching sailing ship by one or two revolutions of the engines, but she had no one at the starting gear when the order was given to go ahead. In these circumstances she was held to be within the rule. The reason of the rule is that a steamship is more completely under command than a sailing ship. She can go ahead in the teeth of the wind, and she can stop or go astern as she pleases. This reason

(1) L. R. 4 A. & E. 456.

applied in the case of *The Jennie S. Barker* (1), for she could move; whereas the reason did not apply to the trawler *Prome*, for she could not move. The *Gladys* could and ought to have seen that the *Prome* was stationary and engaged in getting up her trawl, and was therefore immovable. In such circumstances it was the business of the *Gladys* to get out of the way. She should have taken steps to go under the *Prome's* stern without waiting for the *Prome* to do that which the *Gladys* should have known was impossible.

I do not think the question is affected by the definition of a vessel "under way" to be found in the preliminary rule. The *Prome* may very well have been a vessel "under way" within that rule, and yet not have been a "proceeding" vessel within art. 20. Referring to s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, I find that the collision regulations were not infringed by the *Prome;* and even if it could be said that they were, I should be prepared to hold that the departure from them, so far as it consisted of not making way, was necessary in the sense that it was unavoidable.

The case which appears to me to be most in point is that of *The Tweedsdale.* (2) There a moving steam trawler with her trawl down failed to get out of the way of a sailing ship, and yet it was held by Butt J. that she was not to blame because, being incumbered by her trawl, there were special circumstances within the meaning of art. 27 which authorized a departure from art. 20. The present seems to be an a fortiori case, because, as I have already said, the *Prome* was stationary and immovable. Therefore there will be judgment for the plaintiffs with costs.

The Gladys alone to blame.

Solicitors for plaintiffs: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for defendants: *Ince, Colt & Ince.*

(1) L. R. 4 A. & E. 456. (2) 14 P. D. 164.

T. L. M.

1909
Nov. 16.

[IN THE CONSISTORY COURT OF LONDON.]

THE RECTOR AND ONE OF THE CHURCHWARDENS OF HAYES *v.* FULFORD AND ANOTHER.

Ecclesiastical Law—Faculty—Jurisdiction—Refusal of Faculty for Communion Table with Marble Slab forming the Top of the same.

A faculty cannot legally be granted for a Communion table with a marble slab forming the top of the table though the rest of the table is of wood.

THIS was a cause of faculty instituted on behalf of the Reverend Ernest R. Hudson, the rector, and C. A. Battiscombe, one of the churchwardens, of the parish church of Hayes, in the county of Middlesex and diocese of London, for the purpose of obtaining a faculty for certain alterations in the parish church of Hayes described in the petition in the suit and shewn on a plan annexed thereto as follows: "To place a new Communion table and a painted reredos in memory of the late rector and his wife by the Godding family in the chancel of the parish church and to place the present Communion table at the east end of the south aisle with a cross and candlesticks on a shelf or window ledge above it."

The petition stated that the estimated cost of these alterations would be entirely borne by the donors of the memorial; that the amount of accommodation in the church would not be altered by the proposed alterations; and that a vestry meeting had resolved that the proposed alterations should be carried out. The prayer of the petition was that the Court would decree a faculty authorizing the above alterations to be carried into effect.

The citation in the suit was issued on September 25 last, and on October 1 last an appearance as opponent was entered for George Fulford, the people's churchwarden of the parish; and another appearance as opponent was subsequently entered for Alfred Hevens, a resident ratepayer of the parish of Hayes.

On or about October 3 last an answer was brought in on behalf of the two opponents in which they pleaded (inter alia) in

substance in the seventh, eighth, ninth, and tenth paragraphs thereof as follows :

7. The opponents most strongly object to the marble top of the proposed new holy table as an unlawful ornament in the Protestant and Reformed Church of England.

8. The opponents do not oppose the introduction of a new wooden holy table provided the design and length of the same (so that the minister may not be prevented from officiating at the north side) are first approved and sanctioned by the Chancellor.

9. The opponents were unable to ascertain from the designs submitted to the vestry meeting whether the proposed reredos is of such a character as to make it a lawful ornament in the Protestant and Reformed Church of England, but if its design is such they will make no objection to its introduction.

10. With regard to the proposal to place the old holy table at the east end of the south aisle together with a cross and candlesticks on a shelf or window ledge above it the opponents state that a second holy table is not required and they strongly object to its introduction.

1909. Oct. 26. The cause was now heard before the Chancellor of the diocese of London (Dr. Tristram, K.C.).

The rector in person moved the faculty.

The opponents were represented by their solicitor.

It appeared in evidence that the proposed reredos would be in the form of a triptych consisting of three painted panels, the centre picture representing the Presentation in the Temple and the two side panels representing the Annunciation and the Visitation respectively.

The result of the rest of the evidence so far as material to this report appears from the judgment.

Cur. adv. vult.

1909. Nov. 16. DR. TRISTRAM. In this case the Reverend Ernest R. Hudson, rector of Hayes, filed a petition on September 25 last in the registry of the Court for a faculty to be granted authorizing himself and his churchwarden to place in the chancel of the parish church a new Communion table and

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a painted reredos in memory of the late rector of the parish, the Reverend Mr. Godding, and his wife, the cost of which was to be defrayed by their children, and to place the present Communion table in the south aisle at the east end of the church with a cross on a shelf or on a window ledge above.

Mr. George Fulford, the people's churchwarden, and Mr. Hevens, a parishioner, filed an answer in objection to the application.

On October 26 last the rector moved the Court to grant a faculty authorizing himself and his churchwarden to place in the chancel of the church a holy table with a marble slab on the top of it, together with the proposed reredos. I had previously informed him in the registry that it had been ruled by the Judicial Committee of the Privy Council in the case of *Liddell* v. *Beal* (1) that the holy table was required to be of wood and no part of it of stone. In that case the article of church furniture complained of consisted of a marble slab in St. Barnabas' chapel, supported upon stone carved arches. The Court in that case proceeded: "The question is whether this structure is a Communion Table within the meaning of the law. . . . . When the same thing is signified it may not be of importance by what name it is called, but the distinction between an 'Altar' and a 'Communion Table,' is in itself essential, and deeply founded in the most important difference in matters of faith between Protestants and Romanists; namely in the different notions of the nature of the Lord's Supper which prevailed in the Roman Catholic Church, and those which were introduced by the Reformers. By the former it was considered as a sacrifice of the body and blood of the Saviour. . . . . The Reformers, on the other hand, considered the Holy Communion not as a sacrifice, but as a feast, to be celebrated at the Lord's Table; though as to the consecration of the elements, and the effect of this consecration, and several other points, they differed greatly amongst themselves. . . . . Under these circumstances the first question is, whether the stone structure at St. Barnabas is a Communion Table within the meaning of the canons and the rubrics; and their Lordships are clearly of opinion that it is not. The case

(1) (1857) Special Report by Moore.

is within the principle of Sir Herbert Jenner Fust's decision in *Faulkner* v. *Litchfield* (1), from which indeed the present proceeding is in effect an appeal. . . . . The decree complained of in the appeal of *Liddell* v. *Beal* (2) has ordered the then church or chapel wardens of St. Barnabas to remove the present structure of stone used as a Communion Table, and to provide instead thereof a movable table of wood. Their Lordships had at first some doubt whether the law had prescribed of what material the table should be made; but on further consideration they are satisfied that the opinion expressed by Sir Herbert Jenner Fust, and adopted in the decree in this case, is well founded and confirm it." (3)

The rector pointed out to me at the hearing, as a precedent for my sanctioning a marble slab being placed on the top of the holy table in this church, that Dean Stanley had erected a holy table in Westminster Abbey many years ago which was wholly of marble.

I made inquiries as to what Dean Stanley had done, and I ascertained that in substitution for a stone table, which no doubt had remained there from the time of the Reformation, he erected a wooden table with a marble slab on the top. I should mention that the practice is, where a stone altar is found in a church that has been there probably since the Reformation, not to remove it.

In a case that came before me in the city of London I found a holy table in stone in a side chapel which had been there from the time of the Reformation, and as it offended no one I allowed it to remain. There is also in Durham Cathedral a stone holy table which has been there for the last two hundred or three hundred years. Another point is that Westminster Abbey is a Royal peculiar, and the Sovereign is the judge of what is to be done there; therefore what is done there is no precedent for a parish church.

I am bound by the decision of the Judicial Committee of the Privy Council in *Liddell* v. *Beal* (2) to decline to sanction a marble slab being placed on the holy table in this church.

(1) (1845) 1 Roberts. 184 (2) Special Report by Moore.
(3) Moore's Special Report, p. 184.

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The rector called my attention to my having allowed in 1904 ornamental mosaic slabs to be hung on the face and two sides of the holy table in the parish church of Chelsea. That was under peculiar circumstances. The case is *The Rector and Churchwardens of St. Luke's, Chelsea* v. *Wheeler*. (1) In that case Mr. Blunt, who had been for many years the rector of the parish, had during his time restored the chancel wholly in white marble, together with the pulpit and the walls and seats. His family were very anxious that the holy table should be in keeping with the surrounding decorations. A subscription had been made by the parishioners to carry out his wishes. The present rector, Archdeacon Bevan, and the churchwardens petitioned for a holy table with a marble slab on the top to be placed there, in accordance with the wishes of Mr. Blunt's eldest son and other members of the family. Mr. Wheeler, who had been churchwarden for twelve years and a parishioner for many years, entered an appearance in objection to the grant of the faculty. Mr. Arnold Statham, who moved for the faculty, said the petitioners were anxious to have a decision of the Court as to whether it was lawful to place a marble slab on a holy table. I stated that the Judicial Committee of the Privy Council had come to the conclusion in *Liddell* v. *Beal* (2) that the Communion table in churches of the Church of England should be wholly of wood. Then it was suggested that the mosaic slabs might be hung on wooden pegs on the front and two sides of the Communion table, so that they might be removable at any time and placed there merely for decoration. Mr. Wheeler, a strong Protestant, had no objection to that being done, and the only question which remained for my consideration was whether I, as Ordinary, under the special circumstances of the case, should be justified in allowing what was proposed under the 82nd Canon of 1604, which orders that the table be covered in the time of Divine service with a "carpet of silk or other decent stuff thought meet by the Ordinary of the place," and if there is a dispute it is to be determined by the Ordinary. Now, I, as Ordinary, considered the matter, and came to the conclusion that under the special circumstances of the case, and more particularly as both

(1) [1904] P. 257. (2) Special Report by Moore.

parties in the parish were anxious that the mosaic ornaments should be hung on the front and sides of the holy table of wood, I should be justified in allowing it to be done. The question depended very much on the construction to be placed on the words of the canon, "other decent stuff." On referring to Walker's Dictionary, I found it is stated that "the word 'stuff' is a generic term signifying material," and in Dr. Johnson's Dictionary the meaning given is "material out of which anything can be made." There is also Scriptural authority for giving this signification to the word "stuff," for in Exodus, ch. xxxvi., v. 7, in reference to the material of which the Tabernacle was ordered to be constructed, are these words in both the Old and the Revised Versions: "For the stuff they had was sufficient for all the work"; and in Exodus, ch. xxxv., vv. 20—28, the materials presented to be used in the work included silver, brass, precious stones, and spun articles of blue and purple and scarlet, and various other articles. Under these circumstances I considered that what was proposed was the wish of the congregation, and that no offence could be taken, as these mosaics did not form part of the holy table, but were hung on wooden hooks so that they might be removed at any time.

Then the rector referred me to a third case—one in which the Chancellor of another diocese had allowed a marble top to be placed on a holy table. (1) But my duty in this Court is to be guided by the decision of the Judicial Committee of the Privy Council, and not by that of a Chancellor in any other diocese, and therefore I decide that a marble slab must not be put on the new Communion table in Hayes church, and that it must be a table entirely of wood, and movable. The rector suggested that as the

(1) The case meant was probably *In re St. Mary, Madingley*, in the Consistory Court of Ely, not reported. In this case in 1902 a faculty was granted by the present Chancellor of the diocese of Ely (G. J. Talbot, K.C.) sanctioning the introduction into the church of St. Mary, Madingley, in the county of Cambridge and diocese of Ely, from which church a stone altar had been removed under a previous faculty, of a new movable Communion table of oak; the table to have inserted therein on its top surface a square block 24 inches square of stone, to be placed in such a position that each end of the block should be equidistant from the end of the table, and the front of the block to be four inches from the front of the table and eight inches from the hind part thereof.

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marble slab had already been prepared the table might be allowed to stand upon it, and to that I see no objection.

An objection was taken to the reredos that it might darken the church. I have inspected the church and have had the proposed reredos measured and am satisfied that it will not materially darken the church. There is, therefore, no objection to the reredos. [Dr. Tristram proceeded to deal with other matters referred to in the answers in the suit, but not material to this report, and continued:—] I have inspected the church, and there are no ornaments in it to which any objection could be taken. With regard to the present holy table now in the chancel I order that it be placed for the present in the vestry, so as to enable it to be used in a proposed new church which may be erected in the parish. Under these circumstances, as the respondents have, as they were entitled to do, appeared by solicitor, I allow them 5*l.* for their costs.

A faculty as prayed will be decreed for the erection of the reredos and of a new movable wooden Communion table without the marble slab on the top.

Solicitor for opponents: *W. B. Etches.*

C. F. J.

THE SALYBIA.

1909
Dec. 15.

Admiralty—Practice—Collision—Arrest of Defendants' Ship—Discontinuance of Action before Appearance—Counter-claim—Rules of Supreme Court, Order XXI., r. 16; Order XXVI., r. 1.

On the same day that a collision occurred in the Bristol Channel between a French and a British vessel the owners of the French vessel (which was sunk) issued a writ in rem, and arrested the British vessel at Cardiff. On the following day the warrant was withdrawn, and the British vessel released on notice given that the action was discontinued. Later in the day telegrams passed between the respective solicitors, and on the next day the solicitors for the owners of the British vessel wrote that their clients "have a counter-claim for the damage to their ship, with which we intend to proceed," and, after entering an appearance to the action, they applied for an order that the owners of the French vessel should file a preliminary act with a view to the owners of the British vessel delivering their counter-claim :—

Held that, even if the application was right in form, it must be refused, as a counter-claim could not be set up to an action which had been "wholly discontinued" within the meaning of the Rules of the Supreme Court, Order XXVI., r. 1.

SUMMONS adjourned into Court for judgment on appeal from an order of the registrar refusing an application of the defendants, the owners of the British steamship *Salybia*, in an action of damage by collision, that the plaintiffs, the owners of the French steamship *Boucau*, should file a preliminary act.

Adair Roche, for the defendants, the owners of the *Salybia*.

C. Robertson Dunlop, for the plaintiffs, the owners of the *Boucau*.

The facts, and the interpretation to be put upon the Rules of the Supreme Court affecting the practice in respect of discontinuance, sufficiently appear from the following judgment :—

1909. Dec. 15. THE PRESIDENT (SIR JOHN BIGHAM). In this case the registrar has refused an application of the defendants that the plaintiffs should be ordered to file a preliminary act. The defendants appeal. The facts are as follows :—

On November 2, 1909, there was a collision outside Cardiff between the French steamer *Boucau* and the British steamer

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Salybia, in which the *Boucau* sank. The same day the owners of the *Boucau* issued a writ in rem out of the Cardiff Registry to recover damages, and the *Salybia* was arrested. At noon on November 3 the plaintiffs' solicitors filed a præcipe praying a release of the *Salybia*, "the action having been withdrawn by us before an appearance was entered therein." The marshal of the court accordingly released the *Salybia*. Later on the same day the solicitors for the plaintiffs received a telegram from the defendants' solicitors saying that they were acting for the *Salybia*, that they undertook to appear and put in bail, that they wished the ship to be released, and that they desired to have a copy of the writ sent by post. In answer to this telegram the solicitors for the owners of the *Boucau* wired: "We have withdrawn warrant; *Salybia* released; not proceeding with action"; and this they confirmed by letter on the same day. Crossing this letter the defendants' solicitors wrote: "We hope to hear from you in the morning fully explaining how our clients' ship came to be arrested, as it now appears your clients admit that they have no cause of action."

In my opinion this correspondence put an end to the action. By virtue of Order xxvi., r. 1, the action was "wholly discontinued." Order xxvi., r. 1, says that "the plaintiff may, at any time before receipt of the defendants' defence . . . . by notice in writing, wholly discontinue the action against all or any of the defendants." No doubt there remained an obligation to pay the defendants' costs of the action, but the action was none the less wholly discontinued, and it became impossible for the plaintiffs to prefer any claim in it. This I understand is not disputed. But on the next day, November 4, the defendants' solicitors wrote acknowledging the receipt of the plaintiffs' solicitors' letter of the 3rd and saying, "Our clients of course have a counter-claim for the damage to their ship, with which we intend to proceed. Will you kindly send us the writ in order that we may enter an appearance"; and on November 5 they entered an appearance in London, and sent præcipe thereof to the London agents of the plaintiffs' solicitors. This præcipe was returned by the London agents, "as neither we nor our principals have any authority at present to act on behalf of any of the plaintiffs in the discontinued

action. It seems, moreover, somewhat novel to enter an appearance at all to an action which has been discontinued."

The real question which the defendants wish to raise by their application for an order against the plaintiffs to deliver a preliminary act is: whether they are in a position to proceed with a counter-claim, notwithstanding the discontinuance of the action by the plaintiffs. I think the application is wrong in form, for I do not see how the plaintiffs, who are foreigners, are to be compelled to deliver a preliminary act for the purpose of the intended counter-claim, nor do I know what will happen if they refuse or neglect to deliver such a document. But I prefer to deal with the substance of the matter.

I think it is clear that if a defendant has already "set up" a counter-claim in an action, a plaintiff has no power to prevent the trial of that counter-claim by discontinuing the action. That appears by Order xxi., r. 16, which says: "If, in any case in which the defendant sets up a counter-claim, the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with." But the question is whether in this case a counter-claim ever was "set up," for there is no authority for the contention that a counter-claim can be set up after "the case" has ceased to exist.

I am of opinion that no counter-claim ever was set up. A counter-claim can only be born of a living action. The letter of November 4 was written after the action had been wholly discontinued and when "the case" had gone. If *Bildt* v. *Foy* (1) be good law, I think it is distinguishable on the ground that there the counter-claim was mentioned while the action was still alive, whereas here it was not mentioned until after the action was dead. I doubt, moreover, whether a mere casual reference to an intention to prefer a counter-claim can be described as setting up a counter-claim at all. I think the registrar was right in refusing the application.

Solicitors for the owners of the *Salybia*: *Parker, Garrett & Co.*
Solicitors for the owners of the *Boucau*: *Stokes & Stokes.*

(1) (1892) 9 Times L. R. 34, 83.

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1909
Nov. 1, 3, 4, 5.

THE POLYNESIEN.

Admiralty—Collision — Inevitable Accident — Onus of Proof — Compulsory Pilotage—Singapore Harbour—Straits Settlements Ordinances, (1879) *No.* 8, *ss.* 1, 12; (1885) *No.* 5, *s.* 4; (1905) *No.* 7, *ss.* 20, 23; (1905) *No.* 8, *ss.* 21, 32.

The defendants' steamship, whilst proceeding, in daylight, out of the harbour of Singapore, ran into and sank the plaintiffs' vessel at her moorings. The defence set up was inevitable accident due to an abnormal current, and, in the alternative, compulsory pilotage:—

Held, that the defendants were liable, for they had not succeeded in establishing the existence of the abnormal current relied on, and, therefore, the onus of proof being on them, they had failed to shew that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill. Secondly, that the defence of compulsory pilotage was not available, for the repeal of s. 12 of the Straits Settlements Ordinance No. 8 of 1879 has rendered pilotage at Singapore no longer compulsory.

Action of Damage by Collision.

The plaintiffs were the owners of the *Djambi*, and her master and crew, suing for the loss of their effects.

The defendants were the Compagnie des Messageries Maritimes, owners of the *Polynésien*.

On January 11, 1909, about 5.15 p.m., the weather being fine and clear, the steel screw steamship *Djambi*, belonging to the port of Batavia, of 321 tons gross register, with engines of 200 horse power nominal, and manned by a crew of twenty-six hands, was lying moored alongside the Tanjong Pagar East Wharf, Singapore, with her head towards the entrance to the Albert Dock, completing her loading of general cargo for Pangkalan Brandaw, when she was struck such a heavy blow, on the port side in the way of the after hatch, by the stem of the *Polynésien* that she was cut into and caused to founder almost immediately.

The plaintiffs, by their statement of claim, alleged that the collision was solely caused by the negligent navigation of the *Polynésien*, and that "those on board the *Polynésien* neglected to take the proper or any measures in due time or at all to keep her clear of the *Djambi*, and to prevent her doing damage."

The *Polynésien* is a French steel screw steamship of 6363 tons

gross and 3544 tons net register, 482 feet in length, and is fitted with engines of 818 horse power nominal. She was, at the material time, in the north channel, Keppel Harbour, Singapore, in the course of a voyage from Borneo Wharf to Saigon with passengers, mails, and cargo, and was being navigated by a duly-licensed pilot. She was proceeding at various speeds, shaping a course to the south-eastward, when, according to the defence, on "nearing Tanjong Pagar Wharf, she encountered a strong and unusual eddy so that she failed to answer her port helm. Her engines were at once put full speed astern and both anchors let go; but, before the way could be taken off, her stem collided with the port side of the *Djambi*."

According to the plaintiffs, the wind at the time was about N.E. light, and the tide half ebb of the force of two to three knots. According to the defendants, the wind was southerly a light breeze, and the tide was running to the eastward at about six knots, but variable in force.

The defendants denied "that the collision and damage alleged were caused or contributed to by the negligent and improper navigation of the *Polynésien* by the defendants or their servants," and said that the "collision was the result of an inevitable accident and could not have been avoided by the exercise of reasonable and ordinary maritime skill on their part," and the defendants further said that if the collision was caused or contributed to by any negligent navigation of the *Polynésien*, which they denied, "it was so occasioned solely by the fault or neglect of the pilot who being a duly-licensed pilot for the district was by compulsion of law in charge of the *Polynésien*."

1909. Nov. 1, 3, 4. *Laing*, *K.C.*, and *D. Stephens*, for the plaintiffs, the owners of the *Djambi* and others.

Bailhache, *K.C.*, and *Lewis Noad*, for the defendants, the owners of the *Polynésien*.

The facts of the case, as found by the Court, are fully set out in the judgment, as also the arguments of counsel in respect of the defence of inevitable accident and of compulsory pilotage, the latter involving an examination of the Straits Settlements Ordinances of 1879, 1885, and 1905, relating to pilotage.

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In addition to the case mentioned in the judgment, reference was made to *The Merchant Prince* (1) and *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2)

Nov. 5. THE PRESIDENT (SIR JOHN BIGHAM). This is a case in which a steamer in charge of a licensed pilot ran into a vessel lying at her moorings, and sank her, in broad daylight.

The law applicable to such a case is stated in *The City of Peking* (3), where Lord Watson, in delivering the judgment of the Court, said: "When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself prima facie evidence of fault, and she cannot escape liability for the consequences of her act, except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill." Thus the onus is cast upon the steamer of shewing that the disaster was one which could not have been provided against by the exercise of ordinary care and skill, by which is meant that kind of care and skill which is to be expected of properly qualified men. Counsel for the defendants have undertaken to discharge this onus in the present case, but they have, in my opinion, failed.

The facts are shortly as follows:

The defendants' steamer, the *Polynésien*, is a Messageries Maritimes boat, and at 5 o'clock in the afternoon of January 11, 1909, she, being then at a wharf in Singapore Harbour, was about to put out to sea, and she employed, for the purpose of taking her from the wharf and placing her in a proper position in the channel, two tugs, the tow ropes of which both broke in a very short time. I am not disposed to attribute any great importance, or any importance, to the fact that the tow ropes broke. The vessel got into a position for going out to sea, and she had at that time, apparently, a little stern way. The strength of the tide was three to four knots, and it was running to the eastward. After getting into this normal position, with, as I say, a little stern way on, she went ahead for a short distance, and then what happened is described—whether accurately or not I do not say—

(1) [1892] P. 179 (2) (1869) L. R. 4 Ex. 238.
(3) (1888) 14 App. Cas. 40, at p. 43.

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in the pilot's evidence. I will read some parts of that evidence as shewing what, according to him, happened. He says: "Having got into that (normal) position I had a little stern way on me. Then I gave the order 'full speed ahead.' Having given this order, as soon as she gathered steerage way I gave the order 'half speed' and then 'slow.' That is the usual course to follow. When I went full speed ahead the helm was a little to port. It was steadied as the ship commenced to steer. For the purpose of turning round the Tembaga Reef it is necessary to port your helm. When I commenced to port my helm I was about abreast of godown No. 22"—he is referring to a chart which has been put in, and which has been used during the trial. "When I gave the order she came round very sluggishly, so I gave the orders 'hard-a-port' and 'full speed ahead.' I gave the order 'hard-a-port' first, and then a minute after I gave the order 'full speed ahead.' I gave the order 'full speed ahead' so that I could turn more quickly, as she was coming round so sluggishly; in fact she stopped coming round. At the time I gave the order 'full steam ahead' I was abreast of godowns Nos. 18 and 19. . . . . Notwithstanding the order given she did not move at all, and when I found this was the case I stopped the engines, went full speed astern, and dropped both anchors. I did not really stop. I went straight from right ahead to full speed astern. On my engines going astern her stern swung to the southward, and her stem canted inwards towards the wharf, and struck the *Djambi* abaft the engines—at about right angles." The pilot then goes on to say that "after the collision she answered her helm just as usual, (and) there was no sign of anything wrong with her stearing gear." He had already said that he could not see whether his orders were carried out, and he went on: "If the *Polynésien's* helm was hard-a-port at the time I was attempting to round the Tembaga Reef, and her engines were going as I have described, a strong eddy must have caught me, otherwise I should have got round. I saw no signs of such an eddy, but that would not be visible from where I was on the bridge of the steamer. The usual effect of the tide on a vessel between section 6 (godown 26) to abreast of the red buoy on the Tembaga Reef is to throw your stern in towards the wharf and

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your bow out." The third officer, who was on the upper bridge, and whose business it was to see that the orders given by the pilot were carried out, has described the operations after the straightening up of the vessel in the channel; and it is quite certain that the recollection of one or other of these gentlemen is inaccurate. I do not suggest for a moment that either of them is telling an untruth, but they are inaccurate, and this shews me that it is difficult to rely upon the description given by the defendants' witnesses as to what the navigation of this ship consisted of during the very short time which elapsed between her getting into position just outside the wharf at which she had been moored and her arriving at the point where the accident occurred. The whole thing happened in about four minutes, or something like that—a very short time—and the distance from the wharf at which the *Polynésien* was moored to the place of the collision was something like three-quarters of a mile.

The plaintiffs, of course, are at a disadvantage, for they are not in a position to call any evidence with regard to the orders given on the *Polynésien*, but they have been able to obtain the evidence of the wharf superintendent of the Tanjong Pagar Dock Board, who was a witness of this disaster. He says that he was in his office at the time in question, and that he noticed from the bow window in his office that the *Polynésien* was going more quickly than was usual on a following tide, and was much closer to the wharf than was usual. He says: "I felt instinctively that in the state of the tide the *Polynésien* was too close to the wharves, and I ran to the bridge in front of my office and I watched her. Her engines were going ahead. I could also see that they increased the speed from the extra commotion in the water. I saw that her helm was hard-a-port and her rudder hard over to starboard. I continued watching her. When abreast of the Sheers Wharf she let go her port anchor, which is a stockless anchor. A few seconds afterwards she collided with the *Djambi*. I could not see her starboard anchor from where I was. . . . . I saw the wash of the propeller at one speed and thereafter saw the wash of the propeller at an increased speed. I saw no alteration in the rudder the whole time." This gentleman is probably accustomed to seeing this place navigated by large steamers,

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and I therefore am disposed to rely very much upon what he says.

Now, the defendants, upon whom the onus in this case rests, have cast about to find some explanation of this disaster, and the explanation which they have selected is that of an abnormal current which nobody had noticed before the accident and nobody noticed, apparently, after the accident. Counsel on behalf of the defendants say that there was nothing on board this ship to account for the disaster; that the steering gear and engines were all in good order, and that the orders of the competent pilot were all duly carried out; and that in those circumstances it is impossible to attach any blame for this occurrence to anything done on board the ship, and therefore it becomes necessary to look outside the ship to see what was the cause of the disaster. It is said that the whole mischief was due to an abnormal current, running, as I understand, to the N.E. I am not quite sure about the direction, and I do not think it matters, for I do not believe that there was any abnormal current at all. I have listened to the evidence called by the defendants, and although I do not mean to say, as counsel for the defendants attempted to tell me I would have to say if I did not accept the evidence, that those in charge have intentionally stated what is not true for the purpose of deceiving the Court—I do not for a moment mean anything of the kind—all I do mean is that they have probably been casting about, after the event, to find some cause which would not clash with the loyalty which those on board naturally feel for their own ship, and they have thought—and I daresay that at present they honestly do think—that there must have been something outside the ship which produced the disaster, and something which they could not have foreseen, and therefore could not be expected to provide against. Their frame of mind is exemplified by what the pilot himself says: "If the *Polynésien's* helm was hard-a-port at the time I was attempting to round the Tembaga Reef, and her engines were going as I have described, a strong eddy must have caught me, otherwise I should have got round" —I have already said that nobody saw any signs of such an abnormal eddy—and the pilot goes on and says this: "The disaster was due either to the helm not working properly, or to

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an eddy of which I knew nothing. At times there is a strong eddy round by the red buoy "—I am advised that that is so—"but there is nothing unusual in there being such an eddy. It is one of the things that I, as a pilot, have to be prepared to guard against. We know that there is generally an eddy there which assists the ship round, but we must be on the look out for other eddies." I presume, therefore, that he was on the look out, and that he did not see anything; and there is this strange fact, that there is not a single independent witness called on the part of the *Polynésien* to say that any such abnormal state of the water existed at that time. I am left to rely upon the evidence called from the ship and upon the evidence of the pilot, and I should have expected—if there was anything so abnormal as to make it impossible or unreasonable to look to the pilot to provide against it—that somebody must have noticed the existence of this alleged current at the time. I dismiss the suggestion that there was any such current as is stated to have existed, and if there was no such current the defendants are, in my opinion, left with the onus which is on them still undischarged. It is not for the Court to say, or for the plaintiffs to find out, to what cause in or upon the defendant vessel the disaster is to be attributed. It is sufficient to say that the defendants have failed to point it out. Therefore they are left in this position, that the onus which they undertook to discharge, and which counsel for the defendants quite properly described at the beginning of this case as very serious, has not been discharged. Casting about for an explanation of this disaster, I am advised by the Elder Brethren who are assisting me in this case, and I think, that this vessel was navigated from the first too close to the north side of the channel, where she was hampered by not having sufficient time and space to turn her head, and where the effect of a very strong easterly-going stream was to press the vessel still further towards the side of the channel. I am advised, and I think, that in the circumstances reducing the speed from full to half speed was improper, and that that manœuvre is not unlikely to have led to the disaster. It was suggested by counsel for the plaintiffs that this vessel ought to have left by what is called, I think, the western channel, where she would not have

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had a strong following tide, but a flood tide against her, and that if she had done so this accident would not have happened. Certainly it would not have happened in those circumstances, because the vessel would have been going in a different direction and away from the *Djambi*. Speaking for myself, I think it would have been more prudent in the circumstances to have gone out by the western channel. However, I am told that the ordinary route is by the eastern channel, and, therefore, I am not going to attribute any negligence or blame to the pilot for having chosen the eastern rather than the western channel.

I do not think that there is anything more I need say on the facts of the case. I can sum them up by saying this, that the defendants have entirely failed to convince me that this accident was due to the alleged abnormal current—I do not believe that there was any abnormal current—and I am therefore driven to the conclusion, and am entitled to come to the conclusion, that the collision was due to some mismanagement on board the *Polynésien* itself. It is not for me, nor is it for the plaintiffs, to say what that mismanagement was. If the collision was not due to anything outside the ship, then it must have been due to something inside the ship, and that something must, in my opinion, have been mismanagement, in the absence of evidence to shew that it was not.

The defendants, however, rely also on the defence of compulsory pilotage. This is a defence which must be clearly established before it can be allowed to prevail. It means that the law has taken the charge of the ship out of the hands of the owners' servants and has placed it in the hands of a qualified or licensed pilot, whom the owner is bound to employ and pay, but over whom he has no control. The employment of a compulsory pilot is always enforced by a legal penalty, and therefore the enactment requiring such employment must be clear and precise. What is the enactment in this case? It appears that by an ordinance (No. 8 of 1879) of the Straits Settlements, which is termed "An ordinance to consolidate and amend the law relating to pilots and pilotage," it was provided (s. 1) that it should not be lawful for any person to take any ship out

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of Singapore, except as provided by that ordinance. By s. 12 it is provided that any person in charge of a ship who leaves the harbour without having a licensed pilot on board shall be liable to pay the regulation pilotage dues, and, further, that in default of such payment double the amount may be recovered by proceeding before a magistrate by way of penalty. So the law remained until April 28, 1885, when by s. 4 of another ordinance (No. 5 of that year) s. 12 of the earlier ordinance was repealed; and by a later enactment, namely, "The Pilots' Ordinance, 1905," the whole of the ordinance of 1879 was repealed. The last-named ordinance contained no clause corresponding with s. 12 of the ordinance of 1879. If, therefore, pilotage was made compulsory by the ordinance of 1879, it certainly ceased to be compulsory at the date of the last-made ordinance, which was April 14, 1905. It is said, however, that compulsory pilotage was established by an ordinance of April 7, 1905, and by certain acts done in pursuance of that ordinance. This is an ordinance "to provide for the acquisition by the Government of the Straits Settlements of the undertaking known as the Tanjong Pagar Dock Company Limited, and for the management of the same." From its terms it appears that there had been a company in Singapore called the Tanjong Pagar Dock Company Limited, which owned the wharves used by the shipping entering and leaving the port, and that this undertaking was to be transferred to the Government of the Straits Settlements. It was so transferred, and by ss. 20 and 23 it was provided that a board, to be called the Tanjong Pagar Dock Board, should be appointed by the Governor, which should carry on the business of the old company. This board was appointed, and it made certain rules and regulations relating to the berthing and towage of vessels coming to or leaving the wharves. The second regulation, under the heading of "Towage," is as follows: "Vessels requiring to be towed to or from the wharves or assisted when berthing or leaving by a tug shall be piloted by a duly-licensed pilot unless the board waive this condition, and shall only employ the board's tugs. Should any other tug or launch be used without the permission of the wharf superintendent the same charge will be made

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as if one of the board's own vessels had been employed." It is said that this rule makes pilotage compulsory. I am quite clear, however, that it does not. I can find no authority vested in this board giving the board power to make pilotage compulsory, I do not think the rule purports to make pilotage compulsory, and no penalty is attached to the omission to employ a pilot. Although, perhaps, the evidence taken on commission with reference to the existence of compulsory pilotage is in strictness inadmissible, it is satisfactory to know that my finding on the question is in accordance with the views of merchants and others engaged in business in Singapore.

There will be judgment, therefore, for the plaintiffs with costs.

The Polynésien alone to blame, and pilotage not compulsory.

Solicitors for plaintiffs, the owners of the *Djambi: Clarkson & Co.*

Solicitors for defendants, the owners of the *Polynêsien: Gellatly & Son.*

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[IN THE COURT OF APPEAL.]

THE EGYPTIAN.

Admiralty — Collision — Negligence of Defendants' Servant causing original Damage—Negligence of Plaintiff's Servant causing subsequent Loss—Servant acting in Dual Capacity—Liability for consequential Damage.

In an action of damage by collision, it appeared that a trawler belonging to the defendants was so negligently handled by her temporary master that, in taking up her berth in Grimsby Dock, she fouled a water boat, and drove that boat against the quarter of the plaintiff's trawler, which was lying moored in the dock, and which, owing to leakage resulting from the collision, ultimately sank.

The defendants, whilst admitting liability for the damage caused by the original contact, denied that they were liable for the subsequent foundering of the plaintiff's vessel, on the ground that their temporary master, after the collision, and knowing that it had happened, had resumed his duties as watchman on board the plaintiff's trawler, and had negligently failed to discover and stop the inflow of water which caused the trawler to sink.

In the Court below it was held that the initial negligence of the servant of the defendants was the cause of the disaster, and, therefore, the defendants were liable for the whole loss :—

Held by the Court of Appeal, that the exercise of reasonable care by the servant of the plaintiff, on the resumption of his duties as watchman, would have avoided the consequential loss, and, therefore, the defendants were only liable for the damage caused by the original contact.

Appeal by defendants, the Albion Steam Trawling Company, owners of the *Egyptian*, against a decision of Bargrave Deane J., in an action of damage by collision, in favour of the plaintiff, John Grant, owner of the *Nelson*.

The case turned on the question of the liability of the defendants for part only (as they admitted), or for the whole (as the plaintiff alleged), of the damage done to the *Nelson* through the negligence of one William Barron, who held a certificate of competency from the Board of Trade as a skipper of steam fishing vessels, and who, besides acting (as he was doing on the present occasion for the defendants) as a substitute for skippers who happened to be prevented from taking charge of their vessels, also filled in his time by acting (as he was doing

on the present occasion for the plaintiff) as watchman for fishing vessels in Grimsby Dock.

On November 7, 1908, about 3 P.M., the weather being fine and clear, the wind south-easterly, light, and the tide flood of no force, the plaintiff's steam trawler *Nelson*, of 134 tons gross register, was lying moored, with no one on board, in No. 1 fish dock at Grimsby, coaled and iced ready to proceed to sea on a fishing voyage, when the defendants' steam trawler *Egyptian*, in entering the dock, in charge of William Barron, as acting master, was (as the defendants admitted) so negligently navigated or managed that with her stem she struck the port quarter of an iron water boat called the *Aqua*, belonging to the Great Central Railway Company, and thereby forced the forward part of the *Aqua* against the starboard quarter of the *Nelson*. After mooring the *Egyptian*, William Barron, who was in the employ of the plaintiff as watchman of the *Nelson* and of another trawler, the *Weelsby*, went on board the *Aqua* to see what damage, if any, had been done to the *Nelson*. The subsequent details relating to the sinking of the *Nelson* fully appear from the judgment delivered in the Court below :—

1909. June 29. BARGRAVE DEANE J. This is a peculiar case, because the whole question centres on the position which an individual occupied, namely, a man called William Barron. Mr. Barron in this case has two entities, he has an entity as the servant of the plaintiff and an entity as the servant of the defendants, and the defendants admit that they are responsible for his negligence in the matter of this collision; they have pleaded it, and they cannot be heard to say that he was not their servant at that time. For this purpose I will call him "Barron the Egyptian," and I am satisfied that "Barron the Egyptian" at the time of the collision knew that he had driven the *Aqua*, the water boat, against the starboard quarter, or counter, of the *Nelson*, and he went on to the *Aqua* to see what damage had been done to the *Nelson*, and, in my opinion, he was guilty of considerable negligence at that time in not thoroughly investigating the damage he had done, if any, to the *Nelson*. Having satisfied himself, apparently, that he had done no damage to the

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Nelson, he imparted that piece of information to "Barron the Nelson," and "Barron the Nelson" was perfectly satisfied with the information given him by "Barron the Egyptian," that no damage had been done to the *Nelson*, and "Barron the Nelson" was quite content in his own mind that all was well. Now we have got to look at what happened. This—I do not know what to call it—plate with the lug in it which had been fastened from inside on the starboard quarter of the *Nelson*, by the force of the collision of the *Egyptian* with the *Aqua*, had been driven right into the hull of the *Nelson*. It had sheared off the bolts by which the plate was fastened to the hull, and the plate with the lug on had fallen down in between the skin of the ship and the cabin lining. Now that left four holes where the four bolts had gone in through the hull, and also a large centre hole where the lug had gone through between the four bolt holes. We are told that owing to the draught of this ship at that time the result was that one of the holes left by one of the bolts would get the lip of the water in the dock, so that a very small quantity would begin to get into this vessel's hold; and I am told by the Elder Brethren who are assisting me that, if this accident had been discovered by "Barron the Egyptian" at the time that he ought to have investigated it and discovered it, the hole could have been stopped up with the most perfect ease by him at the time, and nothing would have happened. But he did not look and did not discover it, and the result was that water went trickling into the hole until she got deep enough to submerge the bigger hole which was caused by the lug being driven in, so that a large aperture would then be open, and she would rapidly take in water and fill.

Now let us look at what the evidence of Barron is. He says "The accident happened between a quarter and half-past 3 in the afternoon. I boarded the *Nelson* off the *Aqua* on to her starboard quarter. I did not look round her counter before boarding her, I looked all round her quarter after I got on board"; but it stands to reason that he would not see, looking over the quarter, what had happened underneath the counter. "I saw no signs of damage. Then I boarded the foreign trawler which was alongside the *Nelson*. I could see no damage from her.

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The whole thing took no more than half an hour. I then boarded the *Nelson*, I went into her cabin, I mended the fire, I could see no sign of damage in the cabin. I then boarded the *Aqua* again. We watered the *Egyptian*, and I was satisfied then that there was no real damage. The *Aqua* left, and a lighter came to coal the *Egyptian*." Apparently after that he boarded the *Nelson* again. He said, "I went down into the engine room of the *Nelson* to trim the lamp, at a quarter to 6 I went to look for the *Weelsby*." He was a watchman engaged by the plaintiff to look after both his vessels, the *Weelsby* and the *Nelson*, and as the *Weelsby* was lying on the opposite side of the dock, he would have to go round along the dock and over the bridge to get to where the *Weelsby* was lying. "I went to her, I locked her up, and I returned to the *Nelson* at a quarter past 6." And there he was doing his duties, apparently perfectly satisfied that nothing had happened, up to a quarter past 6, away from the *Nelson*. "I then laid down in the *Nelson* on the locker until 8.20 P.M. I had no idea that she was making any water." I am of opinion that he would probably not hear this water just running down the side of the skin of this vessel, running down as it was at the time through the one rivet hole which had been exposed to the lip of the water in the dock. "I then locked up the cabin. In the course of the night I made five trips to the *Weelsby*. I was only on the *Nelson's* deck during the night, and not below. I first thought something was wrong about 2.30 A.M. on the Sunday. When I came back to her I used to board her over her bows, but then I found that her bows were up, and I had to board her by first going on board the *Griffin*. I then found on her afterdeck a pool of water three feet in breadth and six inches deep."

Now he says that that satisfied him for the first time that there was something wrong with this vessel. He says he went off at once to his superintendent engineer's house, a mile away; he tried to rouse him, but failed; he came back and went to the *Nelson*. He then looked out for another superintendent, Mr. Baxter, and then he went somewhere else, and so on. He seems to have spent his time trying to find somebody. I do not accept the suggestion of counsel for the defendants that this is all an

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invention. The man has sworn to it, and there is no evidence to the contrary, except the evidence of persons who did not happen to see him. Well, you may call any number of people from there who might have said that they did not see him, although they were about from time to time. I am unable to say that he was guilty of negligence after he discovered this boat was sinking. He said the vessel sank at 4, or shortly after, and he did all he could. I am advised that practically nothing could be done in the short time then available. From 2.30 to 4 o'clock is the only time during which I am able to put my hand on "Barron the Nelson," with a view to seeing that there possibly might be negligence, in which time the *Nelson* might have been saved from sinking. I do not find that he was guilty of negligence during that time.

Now I come back to the original view which I had, and which I still hold, namely, that when you have got one man to deal with in a dual capacity, and you find that the initial negligence was done by him when he was in the service of the defendants, and that that negligence pervaded the whole of the rest of his conduct, then I attribute the negligence which caused this vessel to sink to negligence which happened at a time when he was in the defendants' service, and not after. Therefore I am of opinion that the plaintiff is entitled to recover not only the loss occasioned by the collision generally, but also for the loss occasioned by this vessel having sunk in the dock, and the necessary expenses which follow from that.

The defendants appealed against that part of the learned judge's judgment which pronounced in favour of the plaintiff's claim in respect of the damage due to the subsequent foundering of the steam trawler *Nelson*.

Oct. 27. *Lauriston Batten, K.C.*, and *A. D. Bateson*, for the appellants (defendants), owners of the *Egyptian*.

Laing, K.C., and *Balloch*, for the respondent (plaintiff), owner of the *Nelson*.

LORD ALVERSTONE C.J. This case is very peculiar so far as the facts are concerned, because there was, as Bargrave

Deane J. pointed out in his judgment, this one single servant, whose duties shifted at a certain time when he ceased to be an agent of the defendants, the owners of the *Egyptian*, as far as discharging any duty to them was concerned, and returned to his duty as a servant of the plaintiff.

In our opinion, there is really no question of navigation involving the assistance of our nautical assessors, but, on the one point before us, we are advised that a competent watchman, knowing there had been a collision, ought to have ascertained by going on the *Aqua* whether the *Nelson* had sustained injury. Speaking for myself, I cannot take the view that at 3 o'clock on November 7 it can be said that any darkness or difficulty in the time or circumstances prevented the watchman from doing his duty, and it seems to me that the learned judge, with great deference to him, has evolved that which is wrong. He seems to have thought that there was negligence on the part of the watchman after he resumed his duty as a servant of the plaintiff, and that arose, as he himself described it, from the original negligence which he had been guilty of when a servant of the defendants. There is this passage in his judgment: "When you have got one man to deal with in a dual capacity, and you find that the initial negligence was done by him when he was in the service of the defendants, and that that negligence pervaded the whole of the rest of his conduct, then I attribute the negligence which caused this vessel to sink to negligence which happened at a time when he was in the defendants' service, and not after." It seems to me that that statement assumes that the contributory negligence of the man, as a watchman, is negligence for which the plaintiff is not in any way responsible, and that the responsibility must be borne by the defendants, because he had also been guilty of negligence at the time when he was in their service.

In my opinion the real question is: Could the damage, beyond that actually caused by the collision, have been avoided by reasonable care on the part of those for whom the plaintiff is responsible? I think that question will be found to have been laid down over and over again. There is no question raised as to the amount of damage. It is assumed that the sinking of the vessel was caused by water coming into the ship; it is a question

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of who is responsible for the whole damage. Looking at the findings of fact in this case, I cannot come to the conclusion that the judge has rightly appreciated the position. In any event, it seems to me that the learned judge ought to have considered the question on a broader basis. From 4 o'clock in the afternoon after the collision to 2 o'clock in the morning, knowing that the collision had taken place,—I am only imputing that knowledge to the watchman,—had he been able to discover the condition of the vessel and taken reasonable care, this damage to the vessel, which allowed her to sink, might have been stopped at once.

For these reasons I think, looking at the findings of fact, that the learned judge has not rightly approached the real question. We are obliged to answer it ourselves. The negligence of which Barron was guilty while he was a servant of the defendants did not relieve him from the consequences of his conduct as servant of the plaintiff so as to make the defendants responsible for his negligence. I come to the conclusion that Barron, as the plaintiff's agent, by exercising reasonable care would have discovered the condition of the ship, and that the further damage was due to the plaintiff's agent not taking reasonable steps to ensure the safety of the vessel after she sustained the damage for which the defendants admit responsibility. I think the appeal must be allowed.

BUCKLEY L.J. I agree. When Barron returned on board the *Nelson*, after the performance of his duty to the defendants, he was aware that the *Nelson* had sustained a severe blow. I say so as a result of the evidence. The wound was to a large extent above the water line; one of the bolt holes was below, but the main wound was visible above the water line. When Barron returned on board the *Nelson* it seems to me that it was his duty to ascertain whether or not there was serious injury. All he did was to look from the deck of the ship from a point at which the wound was not visible, and thus to satisfy himself that the ship had not received a severe wound. There were means by which he could easily have ascertained that his satisfaction was misconceived. He could readily have ascertained the damage by getting on to the water boat and looking for himself. In

point of fact he had been there while he was still in the employment of the *Egyptian*, and he had not seen it. He ought to have seen it then. After he had resumed his duty on the *Nelson* it was his duty to ascertain, and he could have ascertained, the real facts. I suppose he did not because he had already been in a position to see and had negligently failed to see what the facts were.

As watchman of the *Nelson* he did not take steps to ascertain the facts, nor did he stand by the ship and wait and see what effect the blow would have. He did neither. He neither went to look, nor did he stand by and see. I think that his negligence in this respect was that which caused the sinking of the ship.

KENNEDY L.J. I am of the same opinion. We may test the plaintiff's case, as put forward by his counsel, in this way. Suppose that the plaintiff had sued this man Barron for negligence in his duty as watchman in allowing this vessel to sink, what answer would have been afforded by the fact that he had been employed by the *Egyptian*? It seems to me that he could not possibly have put in any defence on any ground relating to his employment by the *Egyptian*. It would have been no answer to say "I was the servant of the *Egyptian* and I saw the damage done and thought there was no harm." It would have been no excuse for his non-performance of duty as watchman that he had thought, when navigating the *Egyptian*, that no injury was done. The case would have depended upon the question, "Did you, as my servant, as watchman, use reasonable care to discover the damage and prevent the sinking of the vessel?" It seems to me that directly you put the matter in that form the plaintiff's case fails, and he must be content to recover the damage immediately caused by the collision, and cannot recover in respect of the subsequent foundering of the vessel.

Appeal allowed on issue raised by defendants with costs here and below.

Solicitors for appellants (defendants), owners of the *Egyptian*: *Deacon & Co., for Grange & Wintringham, Great Grimsby.*

Solicitors for respondent (plaintiff), owner of the *Nelson*: *Woodhouse & Davidson.*

T. L. M.

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Dec. 1, 2, 6.

THE PICTON.

Admiralty—Collision—Sailing Vessel engaged in trawling—Shewing Flare-up in sufficient Time—Regulations for Preventing Collisions at Sea, art. 9 (1906) (*d*), *sub-s.* 2.

A steamship proceeding about midnight, at a speed of nearly nine knots, through a fleet of vessels fishing off the north coast of Cornwall, ran down and sank one of them, which had her regulation white fishing light up, and was, at the material time, lying hove to, engaged in hauling in her trawl. The lights of the steamship were first observed at some considerable distance, and when it was noticed by those on board the trawler that the steamship was heading for them, a white flare-up light was shewn where it could best be seen, the distance between the two vessels being then about 300 yards. The Court found that the steamship was alone to blame for not keeping out of the way, and also:—

Held that the flare was shewn "in sufficient time to prevent collision" within the meaning of art. 9 (1906) (*d*), sub-s. 2, of the regulations for preventing collisions at sea.

Action of Damage by Collision.

The plaintiffs were William James Williams, owner of the late trawling smack *Westward Ho*, of Lowestoft, and two survivors of her crew, the latter suing for the loss of their clothes and effects.

The defendants were the owners of the steamship *Picton*, of the port of Cardiff.

The case is reported on the question of the meaning to be attached to the words "in sufficient time to prevent collision" in art. 9 (1906) (*d*), sub-s. 2, of the regulations for preventing collisions at sea. (1)

(1) Art. 9 (*d*): "Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea

"1. If steam vessels . . . .

"2. If sailing vessels, shall carry a white light in a lantern, so constructed as to shew a clear uniform and unbroken light all round the horizon, and shall also, on the approach of or to other vessels, shew where it can best be seen a white flare-up light or torch in sufficient time to prevent collision."

Aspinall, K.C., and *Hugh C. S. Dumas*, for the plaintiffs.

Laing, K.C., and *D. Stephens*, for the defendants.

The case was tried on December 1 and 2, 1909, with the assistance of two of the Elder Brethren of the Trinity House. The facts fully appear from the judgment. In the course of the argument the following cases were referred to: *The Cockatrice* (1) (as to the meaning of the words "when engaged in trawling" in the first paragraph of art. 9 (*d*); *The Argo* (2) and *The Englishman* (3) (as to any infringement of the regulations in respect of lights on board the trawler not being material in the absence of proper look-out on board the steamer); *The Rosalie* (4) (as to a sailing vessel hove to keeping out of the way).

Cur. adv. vult.

Dec. 6. THE PRESIDENT (SIR JOHN BIGHAM). This is an action by the owner of the trawling smack *Westward Ho*, and two survivors of her crew suing for the loss of their effects, to recover damages in respect of a collision with the steamer *Picton*, whereby the trawler became a total loss.

The trawler was of fifty-nine tons register, and was manned by a crew of five hands all told, and late on the night of April 16 last she formed one of a fleet of about sixty fishing vessels which were trawling near Trevose Head in the Bristol Channel. The wind was S.S.W., a moderate breeze, the weather clear, but with a drizzling rain, the tide being first quarter flood. At a little before midnight she was engaged in hauling in her trawl on her port side. She was heading west; her tiller was lashed to port, and she was about stationary in the water. Her regulation trawling light (a globular light) was properly shewing at her masthead, and she had also a deck light. All sail was set except the foresail, which had been lowered, and all hands were on deck. The white lights and the starboard light of a steamer, the *Picton*, were then observed about 300 yards away to the N.E. By this time the head of the trawler had gone round to S.S.E., and the trawler was lying hove to on the water, the cod

(1) [1908] P. 182.
(2) (1900) 9 Asp. M. L. C. 74.
(3) (1877) 3 P. D. 18.
(4) (1880) 5 P. D. 245.

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end of the trawl being still over the port side. In this position she was stationary.

The *Picton* was a steamer of 5083 tons gross and 3241 tons net register, and was manned by a crew of thirty-four hands. She was on a voyage from Cardiff to Venice with a cargo of 7500 tons of coal, and was making about eight and a half knots on a course of S.W. b. W. $\frac{1}{4}$ W. magnetic. Seeing that there was danger from the position of the approaching steamer, Lincoln, the mate of the *Westward Ho*, unlashed the tiller and put it hard-a-port. The trawler, however, did not alter under this port helm. At the same moment the cook lit a flare and exhibited it over the side, but the steamer swept down upon the trawler, instantly destroying her. She sank in about a minute, and three of the five hands were drowned. The other two, namely, Lincoln and a boy named Morris (who was the son of the skipper), were rescued and brought on board the *Picton*.

The foregoing are the facts as I find them so far as they relate to the movements of the trawler. Turning to the *Picton*, her story is that, at and before the collision, the *Westward Ho* was sailing at a considerable speed, her trawling operations having been completed, that she had no sidelights out, that she altered her course, and that she exhibited no flare. In support of this case only three witnesses were called, namely, Smith, the mate, and two young men who were respectively the look-out and the helmsman. They are in my opinion unreliable. It appears that the *Picton* was travelling through this fleet of fishing smacks at a speed of eight and a half to nine knots, and that a little before the collision took place the look-out man had left his post to go to the sleeping quarters of the crew aft to rouse them for the fresh watch which was to come on duty at midnight. He says that he was back at his post before the collision took place, but I doubt it. At all events he seems to have been more concerned in rousing the man who was to succeed him than in attending to his work. His own statement is that he was away about five minutes. The mate Smith was on the bridge, and, to use his own expression, had his hands full. He saw the look-out man leave his post, but he did not see him come back. The

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helmsman says he was attending to his wheel and knew nothing about the look-out. I come to the conclusion that the look-out was, in the circumstances, very bad, even if it can be said to have been existent. It is said that the trawler had all sails set and was sailing something like six knots across the bows of the steamer. But I accept the evidence from the trawler. I think the foresail was down and that the vessel was hove to, the operation of trawling being incomplete. It is true that she had no sidelights out, but she had her regulation fishing light at the masthead, which was in the circumstances all that was necessary. I have said that the flare was exhibited. Two of the three witnesses from the *Picton* deny it, namely, the mate and the look-out, but I prefer the evidence of those who saw the flare to the evidence of those who say they did not see it. My only difficulty about the flare is whether it was shewn in time to prevent collision within the meaning of the regulations for preventing collisions at sea, art. 9 (1906) (*d*), sub-s. 2. The *Picton* was, no doubt, very near when the flare was put over the side, that is, she was between 200 and 300 yards away, but I think that if she had instantly reversed and ported her helm the collision would probably have been averted. She struck the trawler amidships, and the trawler was about sixty feet long. I think, moreover, that the steamer was travelling through this fishing ground at a reckless speed, and that, if it could be said that there was no time after the shewing of the flare to arrest the steamer, it ought to be attributed to the steamer's excessive speed.

I find, therefore, that the *Picton* was to blame for having a very bad look-out, which undoubtedly contributed to the accident. I think the trawler was not to blame. She was engaged in trawling and had proper lights shewing. She did not alter her course or speed at any material time, and she exhibited a flare in sufficient time. There is one further point with which I must deal. [The learned judge then examined, and rejected as untrustworthy, the evidence, given in the course of the case, as to an alleged confession, by one of the survivors of the crew of the *Westward Ho*, of liability for the collision on the part of the deceased skipper of the trawler. The learned judge

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concluded by holding that:] There must be judgment for the plaintiffs.

The Picton alone to blame.

Solicitors for plaintiffs, the owner of the *Westward Ho* and others: *Dubois & Co., for Chamberlin & Talbot, Great Yarmouth.*

Solicitors for defendants, owners of the *Picton: Thomas Cooper & Co.*

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[IN THE COURT OF APPEAL.]

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Admiralty—Collision—Navigation of Goole Reach, River Ouse—Local Practice to Swing—Helm Signal—Regulations for Preventing Collisions at Sea, 1897, *art.* 28.

The plaintiffs' steamship, proceeding up the river Ouse with strong flood tide, neglected, on approaching the bend in Goole Reach, to swing and dredge up stern first, with the result that, not being under proper control, she was carried, at an excessive speed, into collision with the defendants' steamship, which was coming down the reach, and which contributed to the collision by starboarding after giving a port helm signal:—

Held by the Court of Appeal, affirming the judgment of the Court below, that both vessels were to blame, the plaintiffs' vessel for excessive speed due to failing to observe the seamanlike precaution of swinging in the reach, in accordance with the local practice; the defendants' vessel for wrongly starboarding, and failing to obey art. 28 of the regulations for preventing collisions at sea by indicating her helm movement with the appropriate whistle signal.

APPEAL by the defendants, the Lancashire and Yorkshire Railway Company, owners of the *Frankfort*, and cross-appeal by the plaintiffs, the owners of the *Thornley*, against a decision of the President (Sir John Bigham), in an action of damage by collision, finding both vessels to blame.

The case is reported with reference to the local practice, based on seamanlike precaution, for steam vessels, proceeding up the

river Ouse on a flood tide, to swing at or below the bend or ness in Goole Reach, and then dredge up stern first.

The action was tried on May 21, 22, 24, and 25, 1909, when the Court was assisted by two of the Elder Brethren of the Trinity House. The facts sufficiently appear from the following judgment:—

1909. May 28. THE PRESIDENT (SIR JOHN BIGHAM). This action arises out of a collision between the steamship *Thornley* and the steamship *Frankfort*, in Goole Reach of the river Ouse, about 6 P.M. on March 21, 1909. The wind at the time was northerly, the weather fine and clear, and the tide was last quarter flood, running five to six knots. The place of the collision was the upper part of the reach.

The *Thornley* was bound from Hartlepool to Goole. She was in ballast, and she entered the Goole Reach at a little before 6 P.M. on the day in question, intending to wait there until she got her stem in dock.

Now, in rounding the point, or ness, it is the practice to turn, then to drop anchor, and to dredge up stern first until the vessel comes to an anchor, and there to await her stem. This course the *Thornley* did not follow, though it is admitted to be the proper and seamanlike thing to do. It is said that she could not on this occasion follow the invariable practice, because the river was already full of craft, and there was no room; but I am quite satisfied that this was not so. In particular, it is said that a ship called the *Spen* was swinging at the time the *Thornley* entered the reach, and was so low down the reach as to leave no space for the *Thornley* to turn. But the evidence from the *Spen* itself, and from the *Calder*, a vessel which entered the reach immediately after the *Thornley*, is inconsistent with this contention, and is, in my opinion, to be relied on. This evidence shews that the *Spen* had finished swinging, and was riding at anchor further up the reach, namely, opposite the green light, leaving plenty of room for the *Thornley* to turn and come to an anchor in the ordinary way. Why the *Thornley* proceeded past the *Spen* and up the reach as she did I do not know. She may have thought that by so doing she would get an advantage over

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the other ships waiting to enter the dock. It is not, however, necessary to speculate as to this. It is sufficient to say that she improperly steamed up the reach at a speed of eight knots or more, when she ought to have come to anchor. Steaming up in this way brought her opposite the Dutch river where the navigation becomes more difficult.

I leave her there for a moment, and turn to the *Frankfort*. This vessel was coming out of the Victoria Lock stern first, preparatory to going to sea. She came in this way alongside the Victoria Pier, thus clearing the dock walls. She then steamed ahead on her course down the reach. It was just at this time that the two vessels sighted each other. I do not think that the look-out on the *Frankfort* was negligent, or that the *Thornley* could have been seen sooner than she was. The crowded state of the river prevented it. But I do think that the master of the *Frankfort* became confused and lost his head when the unexpected *Thornley* came in view, with the result that, having given a port helm signal, he starboarded his helm, causing his port bow to strike the port side of the *Thornley*.

I blame both the vessels. The *Thornley* ought not to have been where she was at all. She was improperly coming up the reach at a considerable speed, in circumstances in which it was difficult, if not impossible, to see her until she was close up to the point of collision. On the other hand, the *Frankfort* was carelessly navigated at the last moment. I think that both causes contributed to the accident, and that, as both were negligent, I must hold both ships to blame.

Oct. 27. *Aspinall, K.C.*, and *J. B. Aspinall*, for the appellants (defendants), the owners of the *Frankfort*.

Laing, K.C., and *Dawson Miller*, for the respondents and cross-appellants (plaintiffs), the owners of the *Thornley*.

For the appellants (defendants) it was contended that the master of the *Frankfort* was embarrassed by the wrongful action of those in charge of the *Thornley* in not having their vessel under proper control owing to their neglect of the local practice as to dredging up, and, therefore, the manœuvres of the *Frankfort*, if improper, were not negligent. With reference to the alleged

negligent navigation of the *Thornley* the cases of *The Clutha Boat* 147 (1) and *The Blue Bell* (2) were cited.

For the respondents and cross-appellants (plaintiffs) it was argued that, assuming that those in charge of the *Thornley* were negligent, reasonable care on the part of those in charge of the *Frankfort* would have avoided the collision, and the case of *The Margaret* (3) was referred to.

LORD ALVERSTONE C.J. In this case there are two appeals against the judgment of Sir John Bigham finding both vessels to blame for a collision in the Goole river. The vessel going out of dock and down river was the *Frankfort*, and she was condemned because, being in a position in which she had to navigate with reference to the *Thornley*, she starboarded her helm at the last moment, and as a matter of fact the collision occurred, as shewn by the diagram put in, by the port bow of the *Frankfort* striking the port side of the *Thornley*, which vessel was coming up river.

It was contended before us, though not very strenuously, that even if it was negligence to starboard it was one of those cases of the character described by James L.J., namely, due to the difficulty in which the master of the *Frankfort* was put by the action of the *Thornley*, and that, therefore, although there was error of judgment and something which did contribute to the collision, it was not to be taken as negligence. We could not take that view, and we did not call upon counsel for the plaintiffs to argue the point. In the first place, the two manœuvres taken at the last moment were starboarding and hard-a-starboarding and putting the engines full steam ahead, and, speaking for myself, if those manœuvres were going to be justified, either on the ground that they were something done at the last moment, in the agony of the collision, or, what would be still more important to my mind, on the ground that they were adopted in order to avoid going into the wall, and that to a certain extent the *Frankfort* had been obliged to get near the wall because of the *Thornley*, those manœuvres ought to have been stated in the preliminary act. With reference to the

(1) [1909] P. 36.
(2) [1895] P. 242.
(3) *Cayzer* v. *Carron Co.*, (1884) 9 App. Cas. 873.

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suggestion as to acting in the throes or agony of the collision, there is no evidence to justify us in coming to that conclusion, and it seems to us that, upon the ground that after giving a port helm signal she starboarded her helm, and, when she starboarded her helm, she gave no signal to the vessel which was approaching,—a signal which under art. 28 she ought to have given,—there is no reason at all for interfering with the judgment of the learned President, that the *Frankfort* was to blame.

The *Thornley's* cross-appeal has certainly given me more difficulty, and I should have been better satisfied if I had been able to see it expressed in clear language, in the judgment of the President, that he had condemned the *Thornley* either for negligent navigation at the place in which she was, or for hampering and impeding the navigation of the *Frankfort* after she had come away from the tier in ignorance of the immediate proximity of the *Thornley*.

From this point of view it is not immaterial to consider that the case made by the *Thornley* in the Court below was that at a time when she was in sight the *Frankfort* came away from and canted out from the Victoria Pier; and if that case had been made out, then no doubt the *Frankfort* would have been to blame quite independently of the starboarding. What I feel is that great stress is laid in the judgment upon the fact that the *Thornley* did not turn where she ought to have turned, a considerable distance down river, and did not, in accordance with the practice,—instead of going up on the flood tide, as she did, at a substantial rate of speed,—round and get head to tide and put herself under perfect control, and gradually dredge up with her anchor down. The learned judge undoubtedly laid great stress upon that fact, and looking at his judgment I have very little doubt that it was strenuously argued by counsel for the plaintiffs that the position of the *Thornley* with regard to the *Spen* and other vessels made it impossible for the *Thornley* to round when she got to the green light; and I have no doubt that was the reason why so much attention was paid to it in the earlier part of the judgment. If I had thought that the learned President had only decided against the *Thornley* on the ground that she did not round head to tide somewhere about or below

the green light, and therefore was up above the Dutch river in contravention of the usual practice, I should think the judgment could not be supported, especially when there was a distinct act of bad navigation on the part of the *Frankfort* in starboarding into the *Thornley* just before the collision; but after what has been frankly stated by counsel for the plaintiffs, and pressed by counsel for the defendants, I have no doubt that other points were strenuously argued before the President. I have no doubt that the learned President was pressed to say that, wrongly up in the river as she may have been, that did not make her responsible for the collision simply because she was in a wrong part of the river. It was not a question of a statutory rule or local written rule, but a question of seamanlike navigation, having regard to the practice, and, that being so, what did the learned President find? The words he used are these: "I blame both the vessels. The *Thornley* ought not to have been where she was at all. She was improperly coming up the reach at a considerable speed, in circumstances in which it was difficult, if not impossible, to see her until she was close up to the point of collision. On the other hand, the *Frankfort* was carelessly navigated at the last moment. I think that both causes contributed to the accident." In my opinion we should be reading into this judgment a meaning which it ought not to have if we were to hold it merely meant that, because the *Thornley* was in a place where she ought not to have been, she must have contributed to the collision. We must remember that had she turned round she would have been going up under great command, with her head on tide and her anchor down, dredging up, and able to check herself and at any rate to prevent herself swaying about, whereas in the way she was going up it is certainly in evidence that she would be liable to be drawn in towards the Dutch river, and then, when she came out, would have the tide upon her starboard quarter; and she would have to go up at such a speed as to retain steerage way.

In these circumstances we cannot come to the conclusion that the learned President was wrong in the view which he took that the *Thornley*, going up as she was and as she need not

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have been, did in fact hamper and impede the navigation of the *Frankfort*. I think the learned President has found improper navigation on the part of the *Thornley*. Both the appeal and the cross-appeal must therefore be dismissed.

BUCKLEY L.J. I agree, and I only wish to add a word as to the cross-appeal. The conclusion that the *Thornley* was to blame rests upon two propositions. The first is that the learned President concluded as a matter of fact that she had an opportunity of swinging, so as to put herself head to tide below the bend, and did not do so. The second is that in consequence of her not doing so she necessarily came up at great speed, and then found herself in a place where, with a five-knot tide running, it would be very dangerous to try to pass, and so, by failing to put herself head on tide at the ness, she placed herself in a position in which she was occasioning danger to the other ship. I think those two propositions are to be found in the judgment of the President. From those propositions of fact it follows that she was to blame.

KENNEDY L.J. I am of the same opinion. With regard to the *Frankfort's* appeal it is unnecessary to say anything. I think the judgment of the President is clearly right. I have felt considerable doubt in the course of the argument upon the cross-appeal. The learned President in his judgment says, "The *Thornley* ought not to have been where she was at all." Had those words stood alone they would have seemed to me to justify the argument which counsel for the plaintiffs have put before us. I was rendered still more doubtful by certain remarks which the President is reported to have used in regard to the *Frankfort's* navigation; but upon the whole I think one ought to construe the judgment as finding that which it certainly was open to him to find, namely, not merely that this vessel ought not to have been where she was, because, according to local practice and proper seamanship, vessels ought to come round in the way described and go up stern foremost past a certain point, but that the fact of her not doing so on a tide like this made the vessel coming up a source of danger. That there was evidence upon which it

could be held that a vessel in those circumstances may have contributed to the collision cannot, I think, be denied.

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Appeal and cross-appeal dismissed. (1)

Solicitors for appellants (defendants), the owners of the *Frankfort: Hill & Aspinall, for A. M. Jackson & Co., Kingston-upon-Hull.*

Solicitors for respondents and cross-appellants (plaintiffs), the owners of the *Thornley: Downing, Handcock, Middleton & Lewis, for Bolam, Middleton & Co., Sunderland.*

T. L. M.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1909 *April* 26, 27, 29; *May* 1, 18.

C. A. 1909 *Nov.* 22, 23, 24, 25; *Dec.* 11.

THE KING *v.* DIBDIN.

*Ecclesiastical Law—Repulsion from Holy Communion—Lawful Cause—Open and Notorious Evil Liver—Marriage with Deceased Wife's Sister—Criminal Suit—Monition—Prohibition—*1 *Edw.* 6, *c.* 1, *s.* 8—*Deceased Wife's Sister's Marriage Act,* 1907 (7 *Edw.* 7, *c.* 47), *s.* 1.

Sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, validates a marriage between a man and his deceased wife's sister for all purposes, whether the marriage is contracted within or without the realm, and whether before or after the date of the passing of the Act.

The immunity granted by the first proviso in the section to any clergyman of the Church of England from any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if the Act had not been passed, is limited to matters connected with the solemnization of such a marriage and does not extend to the performance of the general duties of his office.

Since the passing of the Act marriage with a deceased wife's sister is not a lawful cause within s. 8 of 1 Edw. 6, c. 1, for repelling the parties to the marriage from Holy Communion.

Where, therefore, the Arches Court of Canterbury admonished a clergyman of the Church of England for having, since the passing of the Deceased Wife's Sister's Marriage Act, 1907, repelled the parties to such a marriage from Holy Communion, as being, by reason of their

(1) As to costs *The Lauretta,* (1879) 4 P. D. 25, was mentioned and followed.

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marriage and cohabitation, open and notorious evil livers, and to refrain from so repelling them in future:

Held by the Divisional Court (Bray J. dissenting) and by the Court of Appeal, that there was no ground for a writ of prohibition to restrain the Ecclesiastical Court from proceeding further in the matter of the monition.

RULE NISI for a writ of prohibition calling on the Principal of the Arches Court of Canterbury to shew cause why a writ of prohibition should not issue prohibiting that Court from proceeding further in the matter of a certain decree and monition admonishing Canon Thompson, the respondent in a suit of *Banister and Wife* v. *Thompson* (reported in [1908] P. 362), to abstain in the future from denying the sacrament of the Holy Communion to Mr. and Mrs. Banister, the promoters of the suit.

The facts are fully stated in the report of the case in the Court of the Arches. (1) For the purposes of this report the following summary will suffice.

Alan Neville Banister, one of the promoters of the suit, was a baptized and confirmed lay member of the Church of England, an inhabitant and parishioner of the parish of Eaton, in the county of the city and in the diocese of Norwich, a regular attendant at Divine service at the church of the said parish, and a frequent communicant.

The Rev. Henry Thompson, the respondent, was a clerk in Holy Orders of the Church of England, vicar of the vicarage and parish church of Eaton, and an honorary canon of Norwich Cathedral.

In the month of July, 1907, the said A. N. Banister, having been then for some time a widower, was desirous of marrying Emily Blanche, his present wife, the other promoter to the suit, then Emily Blanche Petersen, spinster, also a baptized and confirmed member of the Church of England, who was the sister of his deceased wife; and, being under the impression that the marriage, if solemnized in Canada, would be valid in England under the provisions of the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (6 Edw. 7, c. 30), he was minded to go to

(1) [1908] P. 362.

Canada with Miss Petersen and have the marriage ceremony performed there. He thereupon informed the respondent of his intention. The respondent replied that under the law of the Church he would not be allowed to receive A. N. Banister to the Holy Communion. Notwithstanding this, A. N. Banister proceeded to Canada, and on August 12, 1907, was married at the church of St. Giles, Montreal, to his present wife, Emily Blanche Banister. This marriage was a valid marriage according to the law of Canada, but invalid by the law of England until August 28, 1907, when it became valid as a civil contract by virtue of the Deceased Wife's Sister's Marriage Act, 1907. (1)

In September, 1907, the promoters returned from Canada to

(1) Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. 7, c. 47), s. 1: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity: Provided always that no clergyman in Holy Orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed.

"Provided also that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in such church or chapel, such minister may permit any other clergyman in Holy Orders in the Church of England, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

"Provided also that in case, before the passing of this Act, any such marriage shall have been annulled, or either party thereto (after the marriage and during the life of the other) shall have lawfully married another, it shall be deemed to have become and to be void upon and after the day upon which it was so annulled, or upon which either party thereto lawfully married another as aforesaid."

Sect. 3: "(1.) Nothing in this Act shall remove wives' sisters from the class of persons adultery with whom constitutes a right, on the part of wives, to sue for divorce under the Matrimonial Causes Act, 1857.

"(2.) Notwithstanding anything contained in this Act or the Matrimonial Causes Act, 1857, it shall not be lawful for a man to marry the sister of his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife."

Sect. 4: "Nothing in this Act shall relieve a clergyman in Holy Orders of the Church of England

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Eaton aforesaid, where they had since resided. In October, 1907, a correspondence took place between A. N. Banister on behalf of himself and his wife on the one part and the respondent on the other, the promoters desiring to present themselves for Holy Communion at the parish church of Eaton, and the respondent, with the sanction of the Bishop of Norwich, declining to admit them on the ground, as stated by him in a letter of October 17, 1907, that the said A. N. Banister had knowingly and wilfully contracted a union which was declared unlawful "both by the Church and by the law of the land." Finally, in a letter dated October 24, 1907, the respondent wrote to A. N. Banister in these terms: "Dear Sir,—If you present yourself for Holy Communion I shall certainly refuse to communicate you."

This criminal suit was then promoted by Mr. and Mrs. Banister and was sent to be heard and determined by the Arches Court of Canterbury by letters of request signed by the Bishop of Norwich under s. 13 of the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), which recited that the respondent was charged with having within the diocese of Norwich and within two years then last past offended against the laws ecclesiastical by refusing to receive for Holy Communion Alan Neville Banister and Emily Blanche his wife.

On June 26 and 27, 1908, the suit was heard before Sir Lewis T. Dibdin, the Dean of the Arches, and in the result the respondent was admonished for having repelled the promoters from Holy Communion and admonished to refrain from similar acts in the future.

A rule nisi having been obtained on the application of the respondent—

Sir W. S. Robson, A.-G., and *Rowlatt*, for the Dean of the Arches, and *Danckwerts, K.C.*, and *Errington*, for the promoters, shewed cause. The substantial question in this case is whether a clergyman in Holy Orders of the Church of England can repel from the Holy Communion persons whose marriage is valid under the

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from any ecclesiastical censure, to which he would have been liable if this Act had not been passed, by reason of his having contracted or hereafter contracting a marriage with his deceased wife's sister."

Deceased Wife's Sister's Marriage Act, 1907, on the ground that they are open and notorious evil livers within the meaning of the rubric at the commencement of the Communion Service. The right of the promoters and of every other lay member of the Church of England to partake of the Holy Communion might probably be maintained irrespective of any specific statutory enactment; but the right is distinctly declared by 1 Edw. 6, c. 1, s. 8 (1), which provides, among other things, that the minister shall not without a lawful cause deny the Holy Communion to any person that will devoutly and humbly desire it. The respondent contends that he had lawful cause for denying the sacrament to the promoters, and as his authority for that contention he cites the rubric above mentioned. That rubric is in these terms:

"So many as intend to be partakers of the holy Communion shall signify their names to the Curate, at least some time the day before.

"And if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the Congregation be thereby offended; the Curate, having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's Table, until he hath openly declared himself to have truly repented and amended his former naughty life, that the Congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties, to whom he hath done wrong; or at least declare himself to be in full purpose so to do, as soon as he conveniently may.

"The same order shall the Curate use with those betwixt whom he perceiveth malice and hatred to reign; not suffering them to be partakers of the Lord's Table, until he know them to be reconciled. And if one of the parties so at variance be content to forgive from the bottom of his heart all that the other hath trespassed against him, and to make amends for that he himself hath offended; and the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice: the

(1) Sect. 7 in Pickering's edition of the Statutes. This Act was repealed by 1 Mary sess. 2, c. 2, but was revived by 1 Eliz. c. 1, s. 5.

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Minister in that case ought to admit the penitent person to the holy Communion, and not him that is obstinate. Provided that every Minister so repelling any, as is specified in this, or the next precedent Paragraph of this Rubrick, shall be obliged to give an account of the same to the Ordinary within fourteen days after at the farthest. And the Ordinary shall proceed against the offending person according to the Canon . . . ."

That rubric, in common with all the rubrics in the Book of Common Prayer, has the force of statute, deriving its binding effect from the Act of Uniformity of 1662 (14 Car. 2, c. 4). The first point with respect to it is that, assuming that a clergyman may under any circumstances repel from the Holy Communion an applicant who is an open and notorious evil liver, no person could be so described who had merely contracted a marriage sanctioned by the law of the land. Moreover, before an applicant could be repelled he must be, not merely an open and notorious evil liver, but such a one that his open and notorious evil living should be an offence to the congregation. It is that offence to the congregation, and not merely an offence to the clergyman, that justifies repulsion; it is not his conscience that is protected, but the spirit of communion among the congregation. There must be an offence to the moral sense of the parishioners. But how could a congregation be offended by the mere presence at the Lord's Table of persons who are lawfully married? In the Order of the Communion published on March 8, 1548 (1), there is no word authorizing the priest to repel any person, but the presence at the Communion is left to the conscience of each intending communicant, and under the rubric in question there is no justification for repelling any person unless the congregation be offended by his open and notorious evil life. Therefore even before the Deceased Wife's Sister's Marriage Act, 1907, persons in the position of the promoters could not lawfully have been repelled from the Holy Communion. But assuming that they could have been repelled before that Act, they cannot since the Act, for all that has been

(1) This Order will be found in the Appendix to The Two Books of Common Prayer of Edward VI. Compared, by Edward Cardwell, 3rd ed. (1852), p. 427.

said as to their position before the Act applies with greater force since the passing of the Act.

Secondly, the respondent seeks to justify his action in repelling the promoters by relying on certain Canons and Constitutions of the Church, namely, canon 99, which provides that no person shall marry within the degrees prohibited by the laws of God and expressed in a table set forth by authority in the year 1563, and that all marriages so made and contracted shall be adjudged incestuous and unlawful; canon 109, which provides that if any offend their brethren either by adultery . . . . incest . . . . or any other uncleanness and wickedness of life . . . . such notorious offenders shall not be admitted to the Holy Communion till they be reformed; canon 26, which provides that no minister shall in any wise admit to the receiving of the Holy Communion any of his cure or flock which be openly known to live in sin notorious without repentance; and canon 27, which provides that no minister when he celebrateth the Communion shall wittingly administer the same to the persons therein described, and that every minister so repelling any as is specified either in that or in the next precedent constitution shall upon complaint or being required by the Ordinary signify the cause thereof to him and therein obey his order and direction.

In order to appreciate the force of these canons it is necessary to inquire into their origin and history. The Canons and Constitutions of the Church derive their force also from statute, the statute in their case being the Act of Submission of 1533 (25 Hen. 8, c. 19), founded upon an Act of Convocation of 1532, whereby the clergy renounced any claim to promulgate any canons without the King's assent, and the King was empowered to nominate thirty-two persons to search and examine the canons then in force, and it was enacted that such of the canons as the King and these thirty-two persons or the more part of them should deem and adjudge worthy to be continued, kept, and obeyed should from thenceforth be kept, obeyed, and executed within this realm; and those canons which should not be so approved were from thenceforth to be void. The Act also provided that no canons should be made or put in execution within this realm by authority of the Convocation of the clergy which

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should be contrariant or repugnant to the King's prerogative or the customs, laws, or statutes of this realm. This statute was repealed by 1 & 2 Ph. & M. c. 8, s. 3, but was revived by 1 Eliz. c. 1, s. 2. In pursuance, apparently, of the authority vested in the Crown by that statute, King James I. in the year 1603 gave his assent to the body of canons known now as the Canons of 1603. These canons, therefore, so far as they are contrary to statute are void; if not contrary to statute they are binding on the clergy: *Middleton* v. *Crofts*. (1)

Now the whole of the respondent's justification, whether it be under the rubric or under the canons, rests on this basis, that the marriage of the promoters was no marriage, but was an incestuous union; and therefore it is necessary to consider what was and is the law with regard to the marriage of a man with his deceased wife's sister.

The invalidity of such a marriage is due, not to the laws of God, but to Act of Parliament. It is true that the reason or basis assigned by the Legislature for the invalidity with which it affected such marriages was that they were contrary to the laws of God. That does not mean contrary to the Mosaic law as laid down in Leviticus xviii. 18, first because they are not in fact contrary to the law there laid down, and secondly because, even if they were, that law is not binding on Christian nations: see Jeremy Taylor's Works, vol. 9, bk. 2, ch. 2, s. 17, ed. 1851, p. 370. But be that as it may, it was the Act of the Legislature and not its reasons which made these marriages invalid: *Brook* v. *Brook* (2); *In re Bozzelli's Settlement*. (3) The history of this legislation is stated in a note to the case of *Sherwood* v. *Ray* (4) and also in *Reg.* v. *Chadwick* (5) and in *Brook* v. *Brook* (6), and is shortly as follows: By an Act of Succession of 1533 (25 Hen. 8, c. 22) it was enacted that the marriage of King Henry VIII. with

(1) (1736) 2 Atk. 650. In so far as they declare the ancient usage and law of the Church of England they bind the laity also, but not further or otherwise, not having received confirmation from Parliament. See 2 Atk. at p. 653; *Cawdrey's Case*, 5 Rep. p. 1, 32 b.

(2) (1861) 9 H. L. C. 193, at p. 226.

(3) [1902] 1 Ch. 751.

(4) (1837) 1 Moo. P. C. 353, see note (*a*) on p. 355.

(5) (1847) 11 Q. B. 173, at pp. 227 et seq.

(6) 9 H. L. C. 193, at pp. 225, 244.

Katharine of Aragon should be declared, deemed, and adjudged to be against the laws of God and to be taken as utterly void and adnihiled, and the marriage of the King with Anne Boleyn was established. The Act then proceeded to recite that many inconveniences had fallen by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say (among others) any man to marry his wife's sister, which marriages though plainly prohibited and detested by the laws of God had nevertheless proceeded under colours of dispensations, and enacted that no person should from thenceforth marry within the said degrees. The Act of Succession of 1536 (28 Hen. 8, c. 7) repealed the Act of 1533, and after reciting in s. 7 that many inconveniences had fallen by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say . . . . any man married and carnally knowing his wife to marry . . . . his wife's sister, "all which marriages albeit they be plainly prohibited and detested by the laws of God yet sometimes have proceeded under colours of dispensations," &c., it was by the same section enacted that no persons should marry within the degrees before rehearsed. By an Act of 1536 (28 Hen. 8, c. 16) it was enacted—s. 2—that all marriages solemnized before November 3 in the 26th year of the reign of the King which were not prohibited by God's laws, limited and declared in the Act of Succession of 1536, or otherwise by Holy Scripture, should be good, lawful, and effectual. By an Act of 1540 (32 Hen. 8, c. 38) it was enacted that from and after July 1, 1540, all marriages contracted within the Church of England between lawful persons ("as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry"), contract and solemnized in the face of the Church, and consummate with bodily knowledge or fruit of children should be deemed, judged, and taken to be lawful, good, just and indissoluble, notwithstanding any pre-contract, &c., and that no reservation or prohibition, God's law except, should trouble or impeach any marriage without the Levitical degrees. This Act was, as to a part immaterial to the present case, repealed by an Act of 1548 (2 & 3 Edw. 6, c. 23), but, as to the part material to this case, confirmed by the same Act. By an Act of 1553 (1 Mary sess. 2, c. 1) the Act of 25 Hen. 8,

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c. 22, and all such clauses of the Act of 28 Hen. 8, c. 7, as declared Queen Mary to be illegitimate or the marriage of Katharine of Aragon with King Henry VIII. to be against the word of God were repealed, and the marriage was thereby declared to stand with God's law and to be valid to all intents and purposes. But that portion of the Act of 28 Hen. 8, c. 7, which specified the prohibited degrees was left unrepealed by the Act of 1 Mary sess. 2, c. 1. That portion was, however, together with the entire Acts of 28 Hen. 8, c. 16, and of 32 Hen. 8, c. 38, repealed by 1 & 2 Ph. & M. c. 8.

Queen Elizabeth upon her accession proceeded to repeal the Act of 1 & 2 Ph. & M. c. 8 and to revive some of the before-mentioned Acts of Henry VIII., and the invalidity of a marriage with a deceased wife's sister depends in the first instance on the revival of those Acts. By 1 Eliz. c. 1, s. 1, the Act of 1 & 2 Ph. & M. c. 8 and all the clauses and articles therein contained (other than such as were excepted) were repealed. By s. 2 several Acts of Henry VIII., including the Act of 28 Hen. 8, c. 16, "and all and every branches, words and sentences in the said several acts and statutes contained," were revived. By s. 3 so much of the statute 32 Hen. 8, c. 38, as was not repealed by 2 & 3 Edw. 6, c. 23, was also revived. By s. 4 all other statutes repealed by 1 & 2 Ph. & M. c. 8 and not specially revived were to remain repealed and void. The result of the revival of the Act of 28 Hen. 8, c. 16, was that all marriages solemnized before November 3, 1534, whereof there was no divorce or separation by the ecclesiastical laws, and which marriages were not prohibited by God's laws, limited and declared in the Act of 28 Hen. 8, c. 7, or otherwise by Holy Scripture were made valid. The effect of this is that, notwithstanding the words of s. 4 of the Act of Elizabeth, the prohibited degrees as contained in 28 Hen. 8, c. 7, are within the intent, construction, and purpose of the Act of 28 Hen. 8, c. 16, and consequently that 28 Hen. 8, c. 7, is to that extent revived: see *Hill* v. *Good* (1); *Harrison* v. *Burwell.* (2)

Moreover, this statute of Elizabeth revived the Act of 32 Hen. 8, c. 38, or so much thereof as had not been repealed by

(1) (1673) Vaugh. 302, at p. 325. (2) (1670) 2 Vent. 9, at p. 17.

2 & 3 Edw. 6, c. 23; that is to say, it was made part of the statute law that all such marriages as within the Church of England should be contracted between lawful persons, "as by this Act we declare all persons to be lawful that be not prohibited by God's law to marry," such marriages being contract and solemnized in the face of the Church and consummate with bodily knowledge, were to be deemed, judged, and taken to be lawful, good, just and indissoluble; and that no reservation or prohibition, God's law except, should trouble or impeach any marriage without the Levitical degrees. The Levitical degrees are those set out in the Acts of 25 Hen. 8, c. 22, and 28 Hen. 8, c. 7—see Coke, 2 Inst. 683—and include the marriage of a man with his deceased wife's sister.

Until the Marriage Act, 1835 (5 & 6 Will. 4, c. 54), also known as Lord Lyndhurst's Act, these marriages were voidable by sentence of an Ecclesiastical Court pronounced in the lifetime of the parties: *Sherwood* v. *Ray* (1) and the preamble of the Marriage Act, 1835; but by the last-mentioned Act they were made "absolutely null and void to all intents and purposes whatsoever." From this it is clear that the status of these marriages in this country is due merely to the municipal law of this country.

It follows that the whole of the respondent's justification, the rubric, the canons, and the invalidity of the marriage itself, which is the basis of the defence under the rubric and canons, is statutory. But what a statute can do a statute can undo. The Act of 1907 has put an end to any right which a clergyman had to repel from the Holy Communion a man who has married his deceased wife's sister, and if the rubric and the canons would before the Act have operated to justify a clergyman in acting as the respondent has done, they have to that extent been abrogated by the Act and no longer afford any justification. The Act provides that no marriage between a man and his deceased wife's sister shall be void or voidable, as a civil contract, by reason only of such affinity. If a marriage is neither void nor voidable, it is valid; and if it is a valid marriage it is not an incestuous union; therefore canon 99 does not apply, and neither does canon 109; the parties to that marriage are not by the mere

(1) 1 Moo. P. C. 353 at pp. 395, 396.

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fact of living together as husband and wife "openly known to live in sin notorious" within the meaning of canon 26, and are not open and notorious evil livers within the meaning of the rubric; and consequently neither under the rubric nor the canons is there any lawful cause within the meaning of the statute 1 Edw. 6, c. 1, s. 8, for repelling such persons from the Holy Communion.

Moreover, it involves a misunderstanding of the scope and intention of the rubric and canons to rely upon them since the Deceased Wife's Sister's Act, 1907, as a justification for repelling from the Holy Communion persons who have married under the sanction of that Act. The rubric, in so far as it justified repulsion at all, did so for the prevention of scandal and to secure repentance before readmission to the sacrament. It contemplates nothing more than a temporary exclusion of the applicant "until he hath openly declared himself to have truly repented and amended his former naughty life." Canon 109 forbids admission to the Holy Communion of those who offend their brethren by incest, &c., "until they be reformed"; and canon 26 forbids the admission of those which be openly known to live in sin notorious "without repentance." But neither Mr. nor Mrs. Banister can repent of their marriage or amend their life or reform by abjuring it. If either were to do so, the other could get a decree for restitution of conjugal rights. But to repel them from the Holy Communion for doing that which the law enjoins upon them is in effect to excommunicate them for the period of their joint lives. No rubric or canon ever conferred upon a parish priest the power to do that. He was merely the hand by which the elements of the sacrament were administered to the communicant. He was in no sense a judge, and had of himself no power of excommunication: See Decret. Greg., lib. i., tit. xxxi., cap. ii.; Decreti pars. ii., causa vi., quest. ii., cap. iii.; and causa ii., quest. i., cap. xviii. He could not even before the Act of 1907 repel a person from the Holy Communion on the ground that that person had gone through the form of marriage with a deceased wife's sister. Before he could do so there must have been an adjudication by a competent Court that the marriage was void, and the only Court competent

to adjudicate upon the question was, since the Matrimonal Causes Act, 1857, the Divorce Court. Before the Matrimonial Causes Act, 1857, an Ecclesiastical Court must have intervened; if a man married a woman within the prohibited degrees he could not put her away without committing an ecclesiastical offence: Decret. Greg., lib. iv., tit. xix., c. iii. His proper course was to proceed for a decree declaring the marriage invalid, and then the sentence of the Court would admonish the parties to separate from each other and to abstain for the future from all pretended matrimonial, incestuous, and unlawful cohabitation with each other: *Blackmore* v. *Brider.* (1) No such decree could now be made; but until such a decree was made the clergyman had no right to repel the parties from the Holy Communion.

The respondent places great reliance upon the proviso to s. 1 of the Act of 1907. That proviso is in these words: "Provided always that no clergyman in Holy Orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed." The respondent contends that the effect of that proviso is this, that when the rights and liabilities of the clergy come in question the Act is to be treated as non-existent. If that is the effect of the proviso, s. 4 of the Act was unnecessary and redundant. The proper way to regard a proviso is as a limitation upon the effect of the principal enactment: *Ex parte Partington* (2); *In re Brockelbank, Ex parte Dunn & Raeburn* (3); *West Derby Union* v. *Metropolitan Life Assurance Society.* (4) The subject-matter of the principal enactment in the present case is the solemnization of marriage between a man and his deceased wife's sister. To attribute to the proviso the wide scope claimed for it by the other side would lead to the most absurd and impracticable results; and that is a good ground for limiting what appears to be the wide effect of a statute: *Reg.* v. *Clarence* (5); *Ex parte Walton, In re Levy* (6); *Hill* v. *East and West India Dock*

(1) (1816) 2 Phillim. 359, at p. 362.
(2) (1844) 6 Q. B. 649, at p. 653.
(3) (1889) 23 Q. B. D. 461.
(4) [1897] A. C. 647.
(5) (1888) 22 Q. B. D. 23, at p. 65.
(6) (1881) 17 Ch. D. 746, at p. 756.

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Co. (1) It is claimed that the effect of the proviso is this: that so far as the clergy are concerned the position is the same as if the Act had never passed; if so, it is the duty of a clergyman to exhort the husband and wife to separate; if he induced them to do so and subsequently married the man to another woman, he would be protected by the proviso though accessory to a bigamy; he may publicly denounce the wife as unchaste, and plead the proviso as a defence to an action of slander; one clergyman may solemnize the marriage and administer the Holy Communion to the parties, and another may repel them from the Holy Communion and stigmatize them as open and notorious evil livers; the parish priest may decline to treat the children of the marriage as legitimate and refuse to recognize the father in the baptismal register; he may insist on entering the maiden name of the mother, and subsequently insist on solemnizing the marriage of an infant daughter against the will of the father on the ground that, the child being illegitimate, the putative father has no voice in the matter. This would give to the proviso the effect of falsifying the facts and of creating a purely fictitious set of circumstances whenever the rights and duties of the clergy come in question, a result so inconvenient and absurd that the proviso cannot be taken in its widest sense if that sense would involve such consequences. The only effect which can safely be given to it is to limit its application to those difficulties which follow directly upon the principal enactment. Thus construed, the proviso protects the clergyman who performs or refuses to perform the solemnization of matrimony between a man and his deceased wife's sister, but has no further or other effect.

To sum up, the promoters are entitled to partake of the Holy Communion unless there is lawful cause for their repulsion; their marriage and cohabitation is not now a lawful cause for repelling them. Assuming that they might before the Act of 1907 have been repelled as being open and notorious evil livers, since that Act they are no longer open and notorious evil livers, and there is no more justification for repelling them than there would before the Reformation have been for repelling first cousins who had married with a dispensation, or than there would now

(1) (1884) 9 App. Cas. 448.

be for repelling a husband and wife who had been married in a registry office. These persons have a statutory right to be present at the sacrament, and they are not to be deprived of that right without a plain enactment in that behalf: *In re Cuno, Mansfield* v. *Mansfield.* (1)

Duke, K.C., P. V. Smith, and *Hansell,* in support of the rule. The argument on the other side is based on the fallacy that in English law marriage is a civil contract and nothing more. In English law marriage is a holy estate as well as a civil contract: *Lindo* v. *Belisario* (2); *Dalrymple* v. *Dalrymple.* (3) Before the Marriage Acts the presence of a clerk in Holy Orders was necessary to the valid solemnization of matrimony: *Reg.* v. *Millis* (4); *Beamish* v. *Beamish.* (5) The solemnization of matrimony was, and when it takes place in a church is now, an ecclesiastical office: *Fuller* v. *Alford.* (6)

There is abundant authority that a marriage may be unimpeachable as a civil contract, and yet contrary to God's law and incestuous in the eyes of an Ecclesiastical Court. Before the Marriage Act, 1835, the marriage of a man with his deceased wife's sister was voidable during the joint lives of the parties by sentence of an Ecclesiastical Court; if this was not pronounced during the joint lives, the marriage was held good as a civil contract, but the survivor might be punished for incest in the Ecclesiastical Court: *Harris* v. *Hicks* (7); Cardwell's Documentary Annals of the Church of England, 1546—1716, ed. 1844, vol. 1, pp. 316, 317, citing Black. Comm. vol. 1, p. 434; *Fenton* v. *Livingstone* (8); *Elliott* v. *Gurr.* (9) An Act of Parliament may, of course, deal with either or both of these aspects of marriage. It may deal with the civil aspect and leave the ecclesiastical side unaffected. Thus by the Marriage Act, 1835, it was enacted that all marriages celebrated before August 31, 1835, between persons within the prohibited degrees should not thereafter be annulled for that cause by any sentence of the Ecclesiastical Court unless

(1) (1889) 43 Ch. D. 12, at p. 17.
(2) (1795) 1 Hagg. Cons. 216, at p. 230.
(3) (1811) 2 Hagg. Cons. 54, at p. 62.
(4) (1844) 10 Cl. & F. 534.
(5) (1861) 9 H. L. C. 274.
(6) (1883) 10 Q. B. D. 418.
(7) (1693) 2 Salk. 548.
(8) (1859) 3 Macq. H. L. 497, at p. 555.
(9) (1812) 2 Phillim. 16.

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pronounced in a suit depending at that date; but though from a civil point of view the validity of these marriages could not be called in question, the parties to them might be punished for incest by the Ecclesiastical Court: *Ray* v. *Sherwood.* (1) This shews that the Legislature has before now dealt with the civil aspect of marriage and left the other aspect unaffected.

There being, then, these two aspects of marriage, (1.) the civil and (2.) the ecclesiastical aspect, the first question in this case is, What is meant by a statute which enacts that a marriage shall not be void or voidable "as a civil contract"? Could plainer words have been used if the intention of the Legislature had been, as on a former occasion, to alter the civil aspect, but to leave the ecclesiastical aspect unaffected? The first and best rule for the construction of an Act of Parliament is that it should be construed according to the intent of Parliament which passed the Act; if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense; the words themselves in that case best declare the intention of the Legislature: *Sussex Peerage Case* (2); and one who would have the Court to depart from that rule must advance something which clearly shews that the grammatical construction would be repugnant to the intention of the Act and would lead to some manifest absurdity: *Richards* v. *McBride.* (3) If the Legislature intended to validate a marriage both from the civil and ecclesiastical point of view, it used very strange language to accomplish that end when it enacted that the marriage should not be void or voidable "as a civil contract." The very use of those words "as a civil contract" suggests the ecclesiastical aspect, and prompts the question, How are these marriages to be regarded from the standpoint of the Church of England? And the answer to the question is given in the proviso, that "no clergyman in Holy Orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the

(1) (1836) 1 Curt. 193, at pp. 199 et seq.

(2) (1844) 11 Cl. & F. 85, at p. 143.

(3) (1881) 8 Q. B. D. 119.

duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed." That proviso is in the widest possible terms and fairly construed can have only one meaning, namely, that as regards the clergy of the Church of England their liability to suit, penalty, or censure is unaffected by the principal enactment in s. 1 of this Act. If the Legislature had intended to limit the effect of the proviso to the actual solemnization of the marriage, as suggested by the other side, there was a precedent ready to hand; Parliament had only to adapt the proviso to s. 57 of the Matrimonial Causes Act, 1857, and provide that no clergyman in Holy Orders of the Church of England shall be compelled to solemnize the marriage of any man with his deceased wife's sister, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize any such marriage. When the draftsman of the Act of 1907, having the Matrimonial Causes Act, 1857, before him, drew the first proviso to s. 1 of the Act of 1907 in wider terms than the proviso to s. 57 of the Act of 1857, the only fair inference is that the effect of the proviso to the Act of 1907 was intended to be wider than that of s. 57 of the Matrimonial Causes Act; and that the draftsman of the later Act had the earlier Act before him is suggested strongly by a comparison of the proviso to s. 57 of the earlier with the first proviso to s. 1 of the later Act, but is put beyond all doubt by a comparison of s. 58 of the earlier Act with the second proviso to s. 1 of the later, for the two enactments are in almost identical terms.

The effect of the Act is, then, to establish a class of marriages which are abnormal and anomalous, valid from a civil point of view for those who have severed or intend to sever themselves from the communion of the Church, conferring on the parties the status of husband and wife and legitimizing their issue, but a class of marriages which are not for the Church of England and with regard to which the view of that Church is not interfered with. This is borne out by s. 4 of the Act, which provides that nothing in the Act shall relieve a clergyman in Holy Orders of the Church of England from any ecclesiastical censure, to which he would have been liable if the Act had not been passed, by reason of his having contracted or hereafter contracting a

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marriage with his deceased wife's sister. If the effect of the Act is to validate these marriages for all purposes, ecclesiastical as well as civil, what object is attained by excluding clergymen of the Church of England from the supposed benefit of the Act?

Then what was the view of the Church regarding these marriages before the Act of 1907? It is quite plain that they were no marriages in the eyes of the Church; they were contrary to the law of God and incestuous—*Harris* v. *Hicks* (1); *Hill* v. *Good* (2); *Reg.* v. *Chadwick* (3); *Brook* v. *Brook* (4); *Fenton* v. *Livingstone* (5); *Ray* v. *Sherwood* (6)—and therefore an offence to the congregation. The duty of a clergyman of the Church of England in regard to these marriages is prescribed by the canons of 1603 and the rubrics, and is, as might be presumed, quite in accordance with the views of the Church. By canon 99 the marriage shall be adjudged incestuous; by canon 109, if any offend their brethren by incest, such notorious offenders shall not be admitted to the Holy Communion till they be reformed; by canon 26 no minister shall in any wise admit to the receiving of the Holy Communion any of his cure or flock which be openly known to live in sin notorious without repentance; and by canon 27 any minister so repelling any shall on being required by the Ordinary signify the cause thereof to him and therein obey his order and direction.

The rubric at the commencement of the Communion Service is to the same effect. It begins by directing those who intend to be partakers to signify their names to the curate, and continues: "If any of those be an open and notorious evil liver . . . . so that the congregation be thereby offended, the curate having knowledge thereof shall call him and advertise him that in any wise he presume not to come to the Lord's Table until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended . . . ."

The third paragraph of the rubric proceeds thus: "The same

(1) 2 Salk. 548.
(2) Vaugh. 302.
(3) 11 Q. B. 173, at p. 232.
(4) 9 H. L. C. 193, at pp. 210, 226, 231, 243.
(5) 3 Macq. H. L. 497.
(6) 1 Curt. 193; affirmed 1 Moo. P. C. 353.

order shall the curate use with those betwixt whom he perceiveth malice and hatred to reign;"—the words following are very important, "not suffering them to be partakers of the Lord's Table." Then in case one of the parties at variance be content to forgive and make amends, and the other will still remain in his frowardness and malice, the minister ought in that case "to admit the penitent person to the Holy Communion, and not him that is obstinate." Then comes a proviso which shews more clearly the duty of the minister towards open and notorious evil livers: "Provided that every minister so repelling any as is specified in this, or in the next precedent paragraph of this Rubrick, shall be obliged to give an account of the same to the Ordinary, &c." Therefore it was plainly the duty of the minister to repel from the Holy Communion persons who were living in incest. It cannot be seriously suggested that to live in incest would not be an offence to a congregation of the Church of England, or that before the minister could repel persons so living he must have a memorial signed by one or more of the congregation to say that he or they were offended in fact, or that the Court which has to try the legality of the clergyman's act must have an affidavit to that effect. If the open and notorious evil living of the parties repelled is such as to be an offence to a congregation of the Church of England, that is sufficient to justify the minister in repelling them from the Holy Communion. At the ordering of priests the Bishop puts to the person about to be admitted to the order of priesthood the question, "Will you then give your faithful diligence always so to minister the doctrine and sacraments, and the discipline of Christ, as the Lord hath commanded, and as this Church and Realm hath received the same . . . . ?" and the answer is "I will do so, by the help of the Lord." It is clear then that, so far from being liable to censure if before this Act he had repelled the promoters, Canon Thompson would have been liable to censure and perhaps suspension if he had admitted them: *Argar* v. *Holdsworth*. (1) The Act of 1907 would of itself protect him from suit, penalty, or censure if since the Act he omitted to repel them; and the proviso to s. 1 of the Act protects him if he repels them, because he would not have been

(1) (1758) 2 Lee, 515.

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liable to such penalty or censure if he had repelled them before the Act.

It is contended that the rubric and canons would not have justified the respondent in repelling the promoters even before the Act of 1907, and the argument is put in this way: The rubric and canons did not even before the Act of 1907 justify the repulsion of lawfully married persons; the promoters are lawfully married persons; therefore they could not have been repelled. But that means either that the rubric and canons did not before the Act justify the repulsion of persons living in incest before the Act but lawfully married after the Act, in which case the major premiss is untrue, or it means that the promoters were lawfully married before the Act, in which case the minor premiss is untrue. From the position that certain marriages have been validated by the Act it does not follow that they were valid before the Act. On the contrary it is beyond all doubt that these marriages were invalid before the Act, and the respondent was justified in repelling the promoters unless the Act with its proviso defeats his justification.

It is said that to give the proviso its full prima facie effect is to render s. 4 of the Act unnecessary; but it may with equal force be urged that to give the principal enactment of s. 1 the effect contended for by the other side is to render the second proviso unnecessary. It is a perfectly legitimate construction of a proviso to read it as defining and emphasizing the principal enactment. There is no necessity to confine the operation of this proviso to such of a clergyman's duties as relate to the solemnization of marriage, because the principal enactment deals not only with the solemnization but with the legalizing of these marriages. So to limit the proviso is not to construe it, but to amend it.

Certain consequences which follow from the natural construction have been cited as reasons why it should receive a forced interpretation; but those consequences must have been contemplated by the Legislature, who knew well the attitude of the Church of England towards the marriage of a man with his deceased wife's sister. First it is said that the effect of the Act might be to excommunicate the parties for the term of their

joint lives at the caprice of the clergyman. But if individual members of the congregation deliberately elect to enter for the period of their joint lives into a union which to their knowledge the Church as a body regards as incestuous, what grounds of complaint have such persons if they are repelled for the same period from the sacraments of the Church? Their only ground of complaint is that they have excluded themselves from the communion of the Church. It is a mistake to suppose that every person living within a parish is entitled to partake of the Holy Communion in the parish church. The right to partake is created by statute, the Act of 1 Edw. 6, c. 1, and regulated by the rubrics. For example by the rubric at the end of the Confirmation Service, "There shall be none admitted to the Holy Communion, until such time as he be confirmed, or be ready and desirous to be confirmed." Therefore by refusing to be confirmed a man may preclude himself from admission to the Communion.

It is idle to quote the Decretals of Gregory IX., because the Corpus Juris Canonici has no effect upon the Church of England save in so far as its pronouncements are in accordance with the law of England. (1)

As to the other objections raised, it is no part of the duty of a clergyman to advocate or enjoin the separation of persons lawfully married according to the civil law, and still less to aid and abet them in committing offences against the criminal law of the land. With regard to the issue of these marriages, the clergy, like all other the King's subjects, must regard such issue as legitimate. These objections are all answered by the maxim "Quod fieri non debuit factum valet," and the proviso to s. 1 of the Act of 1907 has no reference to such matters. But its operation extends to protect clergymen of the Church of England if they decline to administer the sacraments of the Church to those who have deliberately severed themselves from the communion and fellowship of the Church.

Cur. adv. vult.

(1) See the Report of the Ecclesiastical Courts Commission, 1883, vol. 1, p. xviii.; but see also Canon Law in the Church of England, by F. W. Maitland (1898), p. 2, and passim.

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May 18. The following written judgments were delivered :—

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DARLING J. This case comes before the Court on a rule calling on the Dean of the Court of Arches to shew cause why a writ of prohibition should not be awarded to prohibit the Court of Arches from proceeding further in the matter of a certain decree and monition admonishing Canon Thompson to abstain in the future from denying the Holy Sacrament to Mr. or Mrs. Banister.

Distasteful to me is the obligation to decide, after arguments in this secular Court, in reference to matters keenly felt as questions of conscience and religious belief by persons of undoubted integrity, such as are all the parties here concerned. But we cannot choose, and I proceed to give my own judgment as best I can.

The various authorities bearing on this matter have been thoroughly brought to our notice by the learned counsel on either side; and have been criticized closely and explained by them in the course of arguments for which I desire to express alike my indebtedness and my thanks. They have also been carefully reviewed by the Dean of Arches in his judgment. Therefore I do not propose to recur to the statutes, canons, and cases beyond what may be essential to explain my own view.

I start with the fact that Canon Thompson is a parish priest of the Church of England, a reformed Church acknowledging the King as being in all causes, ecclesiastical as well as civil, within his dominions supreme, and the King rules by and in accordance with statutes of the realm. Canon Thompson's right to repel Mr. and Mrs. Banister from the Communion table depends immediately upon the rubric, and that derives its force from the Act of Uniformity of 1662. But the ultimate authority for the rubric, and for the Canons of 1603, so far as these have any authority, is to be found in the statutes; and notably in the Act of Submission of 1533 founded on an Act of Convocation of 1532. This and other statutes of Henry VIII., or such portions of them as are unrepealed, are, of course, of binding effect; their sanction from the moral point of view, however, must on principle appear suspect, for in the days of the Tudors the moral attitude on this question fluctuated, and statutes touching this matter were by

turns passed, repealed, and revived, just as it suited the Parliaments of King Henry, and of his Protestant or Catholic children, to approve as holy, or to denounce as incestuous, his marriage with his brother's widow, Katharine of Aragon. The result so far is that a marriage of a man with the sister of his deceased wife was bad since 32 Henry VIII., as being "against the law of God." Yet bad in law, not because it always was against the law of God, but merely because the statutes of the realm declared it to be unlawful; giving the King's, and his Parliament's, interested interpretation of the law of God for a reason. This, I think, sufficiently appears in *Reg.* v. *Inhabitants of St. Giles in the Fields* (1), and also in *Reg.* v. *Chadwick.* (1) The position is plainly put by Lord Denman C.J. at pages 231 and 232 of his judgment, and with equal clearness by the other judges who heard that case. Until the passing of Lord Lyndhurst's Act (2) such marriages were voidable during the lifetime of the parties to them, and since then they were, until 1907, altogether void.

With regard to the facts of this case it must now be stated that Mr. Banister was married on August 12, 1907, in the church of St. Giles, Montreal, Canada, to his present wife. That marriage, though valid according to the law of Canada, was invalid here in England (for the promoters were of English domicil); but on August 28, 1907, their marriage became valid here, as a civil contract, by the operation of the Deceased Wife's Sister's Marriage Act, 1907. Some months after this validation of their marriage Canon Thompson refused to allow them to communicate in the church of the parish where they were parishioners, and on October 17, 1907, he—apparently not of his own initiative—addressed to Mr. Banister a letter, in which he stated: "If you choose to infer that I charge you with being a notorious evil liver I cannot help it. The inference is your own. I have not made, nor have any idea of making, any inference of the kind. My simple reason for declining to admit you to the Lord's Table is that you knowingly and wilfully contracted a union which was declared unlawful both by the Church and by the law of the land. You can therefore have no claim upon the privileges of the Church. . . . . These, you understand, are the

(1) 11 Q. B. 173. (2) The Marriage Act, 1835.

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bishop's instructions." Now to judge of the legality of Canon Thompson's, or, rather, his bishop's, refusal of the Communion to Mr. and Mrs. Banister, reference must be had to the rubric. This has the force of statute law (see the Act of Uniformity, 14 Car. 2, c. 4, s. 1), and is in these words: [The learned judge read the rubric at the commencement of the Communion Service (1), and continued:—] Now, in my opinion—contrary to what was argued by the Attorney-General and Mr. Danckwerts—a person offending, within the terms of that rubric, might always have been, and still may be, lawfully repelled by the parish priest from the Communion—at all events until the pleasure of the Ordinary be taken—and in addition to this the Ordinary may proceed against the offender. I therefore think that Canon Thompson did not exceed his rights in this respect, as the letter I have already quoted shews, always assuming, for the sake of the argument, that Mr. and Mrs. Banister were in fact and in law offenders against the terms of the rubric—an assumption which the canon's letter of itself leaves open to grave doubt. And I do not think that the action of the priest must of necessity, as was argued, be delayed until it be proved that the congregation have really been in fact offended by the evil living member, for it must, I think, be taken for granted that public incest would necessarily offend a congregation of Christian people. I shall assume, therefore, that before the Act of 1907 persons in the situation of Mr. and Mrs. Banister might properly have been repelled from Communion, but I do not affect to decide this, because of the forcible reasoning of the Dean of Arches in his judgment.

It remains to consider whether the statute of 1907 has affected this position. Now it is plain that before August 28, 1907, such a marriage as that here in question was bad, as being against both the statute law and the law of God as declared by statute, and it is worth remarking that this complex condition is exactly that alleged by Canon Thompson in his letter as his justification. Such a marriage is, however, now valid by statute "as a civil contract." True, the statute which makes it so does not in terms declare the marriage according to the law of God, but

(1) Ante, p. 74.

neither does it say the contrary. For my part, I am of opinion that this marriage, which before was contrary to the law of God merely because the statute condemned it as such, is so no longer, and that by virtue of the statute which legalizes it. For, otherwise, we should have here a declaration that statutes recognize a certain contract as continuing contrary to the law of God, and do yet enact that it shall be good by the law of England.

I am strengthened in this opinion by the terms of the second proviso in the Act of 1907; since, were the meaning of the Act not what I suggest, it would provide in set terms that a clergyman in Holy Orders in the Church of England might solemnize in his church consecrated to the worship of God a marriage contrary to the law of God, and this we must not lightly suppose Parliament to have intended.

This being my view of the effect of the statute of 1907 on marriage between a man and a sister of his deceased wife, it is hardly necessary for me to consider the meaning of the first proviso of that Act, for a clergyman of the Church of England could never before 1907 have held a person to be an "open and notorious evil liver" simply because he had contracted a marriage against neither the law of the land nor the law of God, as declared by the law of the land. To give to the first proviso the effect contended for on behalf of Canon Thompson seems to me to involve the creation of a class of marriages quasi legitimate, and further the creation of a new disability to communicate, not the mere preservation of an old one. Therefore I think that proviso is here no protection to the priest.

It has been suggested, however, that the meaning of the Deceased Wife's Sister's Marriage Act, 1907, is that by virtue of the operation of the Act Mr. Banister is not now an open and notorious evil liver; that the rubric, therefore, does not any longer apply to his case; and that, as a consequence, no priest has at present a duty to repel him from the Lord's Table, and that yet for repelling such an one the priest was not liable to suit or censure, since, but for this Act, he might have repelled Mr. Banister and all others in like case. My chief difficulty in assenting to this argument is that it makes the Act of 1907 to

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alter in fact, though impliedly, the existing rubric, and to substitute another to the effect that the curate may, since the Act of 1907, repel from the Lord's Table persons who are not evil livers within the terms of the rubric, and as to whom it would be no offence in the priest himself to allow them to communicate. This view has so many vague attractions that I almost regret that I do not see my way to adopt it. But it is plain that if one priest might act thus, then might all, and so these people, though not evil livers, would be excluded from the Lord's Table for ever: a situation so intolerable might well lead some lawyer, desirous of knowing from its own mouth the true intention of the Legislature, to respectfully demand of them, "What then, as the result of the obscurely worded statute you have passed, is the true state of these lawfully wedded persons in the presence of the Church?" only to receive for explanation the well-known yet terrible answer—

> "Fama di loro il mondo esser non lassa,
> Misericordia e giustizia gli sdegna:
> Non ragioniam di lor, ma guarda e passa." (1)

If it be thought my view does not take due account of the canons and of the Levitical rules, nor of that "law of God" to which appeal is so often made, I can only reply that the canons, and likewise the Levitical rules, have in England, since the Reformation, no authority but such as they may derive from the statute law. Then as to "the law of God," as applicable to marriage, it is manifest that Henry VIII., with the aid of Archbishop Cranmer and others, setting no more store by Leviticus than they did by the Pope, achieved by those inconsistent enactments in Parliament all that certain theologians, as shown by Pascal in the "Provincial Letters," claimed to do for the self-same laws by means of over-subtle interpretations.

The real difficulty in this case, in my opinion, is that we are asked to ascertain from the words of the Deceased Wife's Sister's Marriage Act, 1907, the intention of Parliament in regard to the particular questions here raised. That intention must be found in the words of the statute itself, or nowhere; and I incline to think that, in reality, Parliament had not any settled intention

(1) Dante, Inferno, Canto III., 49—51.

whatever, except explicitly to legalize these marriages, which had become of tiresome frequency, perhaps desiring to leave altogether unsolved the many embarrassing questions of conscience, some older than the Act, some arising out of it.

For the considerations I have already set forth I come to the conclusion that Parliament did not intend to allow the curate to repel from Communion in the church of their parish, where they might even have been married, persons who had availed themselves of the Act of Parliament; not intending, on the other hand, to allow priests of the English Church to be penalized or censured for solemnizing or permitting such marriages, nor, equally, for refusing their aid in that respect. Perhaps I have not properly appreciated this remedial legislation from the time of Henry VIII. down to the present day. It may be admirable alike in motive and expression; if so, I am not endowed with the qualities necessary to perceive its merits.

BRAY J. This is an application by Canon Thompson to make absolute a rule for a writ of prohibition to prohibit the Court of the Arches from further proceeding in the matter of a decree and monition issued in the said Court admonishing him from denying the Holy Sacrament to Mr. and Mrs. Banister, the promoters in that suit. The facts are fully stated by the Dean of the Arches in his reported judgment in [1908] P. 378, 379. I need not therefore repeat them.

Canon Thompson put forward two contentions—(1.) that the promoters at the time of their repulsion were by reason of their marriage and subsequent cohabitation open and notorious evil livers; (2.) that he is protected by the first proviso of s. 1 of the Deceased Wife's Sister's Marriage Act, 1907, because the repulsion would have been justifiable before the passing of the Act.

With regard to the first point, there was much force in the arguments of Mr. Duke and Mr. Vernon Smith (Canon Thompson's counsel), and in dealing with the second point I shall have to refer to some of these arguments; but I do not think it is necessary for me to decide this point, as I am in favour of Canon Thompson on his second point, and I prefer not to give any opinion on this first point.

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I come, therefore, at once to the second point, and it is to be observed that it is not necessary for Canon Thompson to shew that he has done right in repelling the promoters when and under the circumstances in which he did so. It is sufficient for him to shew that he cannot be punished in such a suit as this. Now I think it is clear that a clergyman can be punished by a suit in the Ecclesiastical Courts if he refuses to perform clerical duties thrown upon him: see *Argar* v. *Holdsworth*. (1) Canon Thompson must therefore shew that but for the passing of the Act he would have been entitled to refuse to administer the Holy Communion to Mr. and Mrs. Banister. He must shew that under the Act of 1 Edw. 6, c. 1, s. 8, there was "lawful cause" for his refusal; and the Attorney-General argued strongly that even before the passing of the Act of 1907 there would have been no "lawful cause." The Dean of the Arches (2) assumed that there was lawful cause. It was, having regard to the result of his judgment, unnecessary for him to decide it. It is necessary, however, for me to decide it. Now, Canon Thompson's contention on this point was that he was justified under the rubric, which has the force of law, or under the rubric when taken in conjunction with canons 26, 99, and 109. I proceed, therefore, to consider the rubric. Could he repel Mr. and Mrs. Banister? First, were they open and notorious evil livers? It seems to me to be clear that since the passing of the Act of 32 Hen. 8, c. 38, marriage with a deceased wife's sister was prohibited by statute law as being contrary to God's law: *Brook* v. *Brook*. (3) It was an incestuous marriage, and it seems to follow that continued open cohabitation under an incestuous marriage would make Mr. and Mrs. Banister open and notorious evil livers in a case where the facts were as well known as here.

Then were they so much so "that the congregation be offended"? It does not seem to me to be necessary to shew that the congregation were offended in fact. The question is, Was the offence such as might reasonably be expected to cause the congregation to be offended? It could not be necessary for the clergyman before he proceeds to act under the rubric to see

(1) 2 Lee, 515.

(2) [1908] P. 362, at p. 392.

(3) 9 H. L. C. 193, at pp. 206, 210, 215, 218, 225, 243.

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whether any, and, if so, how many, of the congregation would be likely to be offended. The person to be repelled must be an "open and notorious" evil liver; that is to say, his sin must be such that it is done openly and so that it would be known to the congregation. I cannot doubt that in this case to admit Mr. and Mrs. Banister to the Holy Communion before the passing of the Act would have been cause of offence to the congregation. They had deliberately broken the statute law, and what was stated in the statute to be the law of God. They were openly and notoriously living as man and wife when they were not man and wife. Of course I am still assuming that the Act had not passed, because the question I am dealing with is what would be the position before the Act passed.

Then does the rubric entitle the clergyman to repel such open and notorious evil livers? It was contended that it did not, and that all the clergyman could do was to "call and advertise" such persons and report to the Ordinary, and that in the meantime he must continue to administer the Holy Communion to them. It is true that in this paragraph of the rubric there is no express direction which in terms authorizes or requires him to repel, but in the next paragraph are these words: "Provided that every minister so repelling any, as is specified in this, or the next precedent paragraph of this rubrick"—which is the paragraph I have to deal with—"shall be obliged to give an account of the same to the Ordinary within fourteen days at the farthest. And the Ordinary shall proceed against the offending person according to the canon." It seems to me clear that this second paragraph assumes that the clergyman can and will repel the proposed communicant, if he comes within the words of the first paragraph. It then proceeds to require that the minister so repelling—which necessarily means after repulsion, not before—shall give an account to the Ordinary. So that the giving an account to the Ordinary is to follow the repelling. In my opinion this rubric, which has the force of law, authorizes, and, I think, also requires, the clergyman to repel a communicant if he be an open and notorious evil liver, so that the congregation be thereby offended, and, therefore, on this rubric alone, there was, in my opinion, "lawful cause." The canons confirm this view. It is

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true that they are not binding on the laity, but they are, so far as they are not contrary to statute law, binding on the clergyman —see *Middleton* v. *Crofts* (1)—and it is the clergyman's conduct, and his position, before the passing of the Act of 1907 that we are considering. Canon 26 provides that "No minister shall in any wise admit to the receiving of the Holy Communion any of his cure or flock which be openly known to live in sin notorious without repentance." Canon 99 provides: "No person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority, in the year of our Lord God 1563. And all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated. And the aforesaid table shall be in every church publicly set up and fixed at the charge of the parish." And canon 109: "If any offend their brethren, either by . . . . incest, or drunkenness, or by swearing, ribaldry, usury and any other uncleanness and wickedness of life, the churchwardens . . . . shall faithfully present all and every of the said offenders . . . . and such notorious offenders shall not be admitted to the Holy Communion till they be reformed." In *Jenkins* v. *Cook* (2) the Privy Council had to consider whether Mr. Cook, the respondent, could be punished for having repelled Mr. Jenkins from the Holy Communion, and the question in dispute was whether there was "lawful cause" under 1 Edw. 6, c. 1, s. 8. In giving judgment in that case the Lord Chancellor, Lord Cairns, said in the middle of page 102, "The 'cause,' therefore, which under the rubric is sufficient to warrant a minister, of his own authority, and without any trial, in repelling a parishioner from the Holy Communion is that he is 'an open and notorious evil liver,' who thereby gives offence to the congregation." I am bound, I think, on these considerations, to come to the conclusion that before the passing of the Act of 1907 Canon Thompson could not have been punished for repelling Mr. and Mrs. Banister from the Holy Communion.

Now, as I refrain from deciding Mr. Duke's first point, I must

(1) 2 Atk. 650. (2) (1876) 1 P. D. 80.

assume that after the passing of the Act Mr. and Mrs. Banister were not evil livers, and, therefore, unless Canon Thompson is protected by the proviso, he is now liable to be punished for repelling them, as in fact he did, from the Holy Communion. Is he protected by the proviso? I think, before deciding that, I must examine the Act as a whole and consider the circumstances under which it was passed.

Before 1907 there had been a long controversy as to whether marriage with a deceased wife's sister should be legalized. On the one side there were those who thought that the Act of Henry VIII., so far as it declared that such marriages were within the prohibited degrees, and Lord Lyndhurst's Act (1) ought to be repealed, and on the other side there were a considerable number of clergymen of the Church of England and not a few laymen who were firmly convinced that such marriages were forbidden by God's law, not because the Act of Henry VIII. said so, but because they were in fact contrary to God's law. When the Act of 1907 is looked at I think it cannot be doubted that it was a compromise between these two opposing views. The words of the 1st section that precede the first proviso are remarkable: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity." As the Dean of the Arches said, it seems to recognize a distinction between the civil and ecclesiastical aspects of marriage and to alter the law as to one without purporting to affect the law as to the other. That there is such a distinction cannot be denied. See *Fuller* v. *Alford* (2), where Cave J. says: "I cannot doubt that the solemnization of marriage is an ecclesiastical office within the meaning of this section. (3) Recent legislation has no doubt provided for civil marriages without any religious office; but, when a marriage is solemnized in church, I am clear that it is an ecclesiastical office and not a civil one." Day J.'s judgment is to the same effect.

The language in the Act of 1907 is quite different from that in

(1) The Marriage Act, 1835.
(2) 10 Q. B. D. 418, at p. 425.
(3) The New Parishes Act, 1856 (19 & 20 Vict. c. 104), s. 15.

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the Act of Henry VIII., which declared all marriages not within the prohibited degrees "should be deemed, judged, and taken to be lawful, good, just, and indissoluble." It is also different from the language of s. 57 of the Matrimonial Causes Act, 1857, which enacted that it should be lawful for persons divorced to marry again, as if the prior marriage had been dissolved by death. It is also useful to compare the language of the Colonial Acts where they are dealing with marriage with a deceased wife's sister. The Canadian Act (45 Vict. c. 42, s. 1) says: "All laws prohibiting marriage between a man and the sister of his deceased wife are hereby repealed, both as to past and future marriages, and as regards past marriages, as if such laws had never existed." (1) The West Australian Act of 58 Vict., No. 11, s. 32, says: "No marriage between any man and the sister of his deceased wife shall within Western Australia be voidable or in anywise impeachable upon the ground only of such affinity between the parties thereto, any law, usage, or custom to the contrary notwithstanding." The Act of the Victorian State, the Marriage Act, 1890 (No. 1166 of the Victorian Statutes, 1890) (2), s. 18, is in substantially the same language, and so is the New Zealand Act of 1880, No. 57, s. 2. In all these Acts it is obviously intended that the marriage should be on the same footing as all other marriages. The Act of 1907 seems to give the persons contracting such marriages their full civil rights, but no more. It does not purport to affect their rights or privileges as members of the Church of England. It does not repeal the Act of Henry VIII., which declared that such marriages were contrary to God's law. This view is strongly confirmed by a consideration of the rest of the Act. The first proviso is intended to protect the clergyman of the Church of England. The extent to which it does so I have to consider presently. The next proviso shews that persons so marrying are not entitled as of right to be married in their parish church as are other parishioners. The clergyman may refuse and is not even

(1) By c. 105 of the Revised Statutes of Canada, 1906, s. 2, it is enacted that "A marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister of a deceased wife of the man. 45 Vict. c. 42, s. 1; 53 Vict. c. 36, s. 1."

(2) A re-enactment of 36 Vict., No. 453, s. 1.

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bound to furnish another clergyman to perform the marriage service. Under the 3rd section a man's adultery with his wife's sister is still to be a ground for a divorce, instead of judicial separation only, presumably as being still incestuous. Under s. 4 the clergyman of the Church of England having contracted such a marriage is still to be liable to punishment in the Ecclesiastical Courts. Why is this, except that in the Church of England such a marriage is still to be considered contrary to God's law? I think this examination of the Act compels me to come to the conclusion that a marriage with a deceased wife's sister was intentionally not put on the same footing as other marriages not within the prohibited degrees, and that the parties were not in the same position so far as their ecclesiastical rights were concerned, and that in the case of a clergyman of the Church of England his position was not intended to be altered, except so far as he chose of his own free will, and not even then in the case of his contracting such a marriage. It is not, of course, contended that he might not administer the Holy Communion to such people or solemnize a marriage between them. The contention is that he cannot be punished if he refuses.

I come now to the proviso. On this, two contentions are put forward by those who shewed cause against the rule. The main contention was that the general words of the proviso must be limited to the particular purpose of the section and were referable to the duties of a clergyman incident to the actual marriage. This, I think, is the ground on which the Dean of the Arches decided against Canon Thompson. The other ground put forward, or rather the argument in support of it, was this: Before the Act the clergyman was bound to administer the Holy Communion to those who were not evil livers. Mr. and Mrs. Banister were not evil livers when they were repelled (the Act having passed); therefore he was bound to administer the Holy Communion to them. I will deal with this point first, because I understand my learned brothers are deciding against Canon Thompson partly on this ground. I cannot think that this argument is sound. The proviso is intended to protect the clergyman, to prevent his being punished for omitting to do

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something which before the passing of the Act he would not have been bound to do. When considering the clergyman's position, you cannot treat Mr. and Mrs. Banister as no longer evil-doers. They have only ceased to be so by virtue of the Act. You are to look at the whole position as it was before the passing of the Act. To test the clergyman's position you must take the Act as not having passed at all, otherwise you give him no protection whatever. He would not before the Act have been bound to administer the Holy Communion to these people. But by the argument he now is to be bound. You are changing his position; you are making him bound to do something which may be abhorrent to him. The fallacy of the argument can, I think, be demonstrated in this way. It is conceded on all hands that a clergyman by virtue of this proviso cannot now be punished for refusing to solemnize the marriage, but if the argument is sound he can be. Let us follow the argument as before. It would run thus. Before the Act he was bound to solemnize a marriage of his parishioners if the marriage was not within the prohibited degrees, and could be punished if he refused. Since the passing of the Act the marriage of such persons is not within the prohibited degrees. Therefore he must solemnize the marriage and can be punished for it if he refuses. The proviso so read gives him no protection at all in a case in which it is conceded that he is protected. And just the same whatever be the duty, as, for example, to publish the banns. It seems to me impossible to read the proviso in the way suggested. The whole position must be looked at upon the assumption that the Act had never been passed at all, and in that view Canon Thompson cannot be punished unless the proviso is limited to the case of performance of duties incident to the marriage. I proceed therefore to consider this. It is a question of considerable difficulty. The words of the proviso are precise and unambiguous. The refusal to administer the Holy Communion to Mr. and Mrs. Banister was something omitted to be done by him in the performance of the duties of his office for which, if I am right up to this point, he could not have been punished before the passing of this Act, inasmuch as before the Act they were open and notorious evil livers. Canon Thompson

is therefore protected if the words are read according to their natural meaning. Why are they not to be so read? I think it will be convenient to examine the reasons given by the Dean of the Arches, especially as they were the reasons put forward to us in the arguments of the counsel for the promoters. They begin in the middle of page 392. (1) "It is a well-established rule of construction of statutes that you must not construe words so as to take away statutory rights which existed before the enactment containing the words in question was passed, unless the words plainly indicate the intention of the Legislature to take away such rights: see observations of Bowen L.J. in *In re Cuno*." (2) No doubt it is; but before the passing of the Act Mr. and Mrs. Banister had no statutory rights to have the Holy Communion administered to them, because they were open and notorious evil livers. It is only the enacting words immediately preceding this proviso that make them cease to be evil livers. There is no rule of law which says that a proviso may not limit the previous enacting words. Indeed, as a rule, that is the object of the proviso.

The next reason is this: "The proviso contains no mention of the right to receive Holy Communion, and does not in terms deprive any one of this right who, apart from the proviso, would be entitled to enjoy it. Does it do so by reason of the generality of its terms? The words of the proviso are undoubtedly very wide; but, being a proviso, it must be construed with reference to the clause to which it is appended, i.e., the first part of the section." (3) No doubt a proviso has reference to the clause to which it is appended, but the clause was not dealing with the solemnization of marriage in a church. It was dealing with the civil status of a man who had entered, or might thereafter enter, into a contract of marriage with his deceased wife's sister. His civil status was altered by the Act, and the proviso was intended to protect the clergyman in the performance of his duties on account of such a change of status. One of the consequences of the changes of status was that he was no longer an evil liver. Why should not the proviso, being admittedly in wide and general terms, have

(1) [1908] P. 362, at p. 392. (2) 43 Ch. D. 12, at p. 17.
(3) [1908] P. at p. 392.

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reference to this? Surely there is every reason why it should. It was inserted, as I have before stated, to protect the conscience of the clergyman, to prevent him from being bound to do acts which might offend his conscience. The Prayer Book teaches him that a man who partakes of the Holy Communion unworthily eats and drinks his own damnation. The clergyman still believes these people to have done and to be doing that which God's law has prohibited, and to be living in their sin and unrepentant. So that such persons if they receive the Holy Communion will, from his point of view, be eating and drinking their own damnation. Is he to be bound to administer the Communion to them, to assist them in what he believes will be eating and drinking their own damnation? And is he to be punished and possibly deprived of his benefice if he refuses? If he is to be protected, as he admittedly is, if he refuses to solemnize the marriage, why is he not also to be protected if he repels them from the Holy Communion? Is the first likely to offend his conscience and the second not? Who can say this? Surely they stand on the same footing. The Dean of the Arches proceeds thus: "The proviso under review is followed by two other provisoes, and they both relate to the actual marriage, one dealing with the use of churches for its solemnization, and the other providing for cases where such a marriage has been annulled or has been followed by lawful marriage before the passing of the Act. This suggests the inquiry whether the proviso in question can be given a reasonable meaning if restricted in the same way, namely, to the actual marriage and its incidents. I think it can." (1) It is true that the next two provisoes both relate to the actual marriage, but is that any reason for saying that the first proviso relates to actual marriages only? I do not see the force of that reasoning. The last two provisoes in their terms relate to actual marriage only. The first is perfectly general. Why general, except that it was intended to be general? Why was not this in its terms, like the last two, confined to the case of marriage if it was so intended? The Dean of the Arches then proceeds to what he thinks will be the absurd consequences of not placing a limit upon what he admits to be

(1) [1908] P. 362, at pp. 392, 393.

its apparently unrestricted terms. The first case, that of the clergyman aiding and abetting in the commission of a felony, is surely met by pointing out that there is nothing in the words of the proviso to protect a clergyman who has committed a felony. As to the second case, it is an almost impossible one, but, if the clergyman's conscience is so tender that it would offend it to recognize the father in making entries in the baptismal register, it is not so absurd that he should be protected. The third case seems to me so impossible that it is unnecessary to consider it. It may be, of course, that the Legislature had not in its mind these possible consequences. But if it had not, is that any sufficient reason for limiting the duties of his office to some particular duties of his office. As I construe the proviso, it was to protect the clergyman's conscience from being offended in the performance of any of the duties of his office. I see no extraordinary anomaly in the case mentioned in the next paragraph of the judgment. The Act contemplates that one clergyman may be offended and another not, and if he has honestly changed his mind, why is not his conscience to be protected? The passage at the end of this paragraph seems to indicate that the Dean of the Arches may have been in the promoters' favour on the point I first dealt with. I hardly think, however, that this is so, because in that case it would be unnecessary for him to put the limitation on the words which he does.

I have now dealt with all the reasons which he adduces in support of his decision, but there were arguments addressed to us against his decision which he does not notice. I refer to the difference between the language used here and the language used in the Matrimonial Causes Act, 1857. I have already pointed out one when I was dealing with the meaning of the words "as a civil contract"; but there is a more important difference between the two provisoes. In the Matrimonial Causes Act, 1857, the proviso is in its terms directly limited to the solemnization of the marriage: "Provided always, that no clergyman in Holy Orders of the united Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit,

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penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person." Why was different language used in this Act except because it was intended that the protection should be more general? It is perfectly plain that the draftsman of the Act of 1907 had in his mind these sections of the Matrimonial Causes Act, 1857, when he drew the Act of 1907, and I think I am entitled to say the same of the Legislature when they passed it, because the second proviso is taken verbatim from s. 58 of the Matrimonial Causes Act, except that "may" is substituted for "shall." So that the first proviso was deliberately altered and extended to include other cases than the one of the solemnization of the marriage. To what other cases? That can only be gathered from the words themselves, and these shew that it was intended to apply to the performance of the clergyman's duties generally. It was said on the other side that the extension was made to cover the case of the publication of banns. But why that case only? Is it to be suggested that the Legislature overlooked the fact that the administration of the Holy Communion was one of the duties of the office of a clergyman? Surely that cannot be supposed. But if it was not overlooked it must have been intended to be included, otherwise it would have been excepted, or some less general words would have been used, or the words suggested by the Dean of the Arches, "incident to the actual marriage," would have been inserted. An argument was addressed to us about the words "such marriage service" being used in the second proviso when no marriage service had been earlier referred to, but I think those words are accounted for by the fact that this proviso was taken bodily from the Matrimonial Causes Act, 1857. The single alteration of the word "shall" into "may" is not wholly without significance. More protection was obviously intended to be given to the clergyman under this Act than in the Matrimonial Causes Act, 1857. In the last-mentioned Act the clergyman was bound to allow the marriage to be solemnized in his church. In this Act he is not so bound. If the clergyman refuses, persons marrying under the provisions of this Act will have to be married elsewhere. Why should it not have been intended that if the clergyman refuses to administer the Holy Communion to them they must go

elsewhere? Both are, no doubt, hardships, but they result from the Act merely altering the civil status of such persons and giving protection to the clergyman's conscience. Now the case rests thus. The words of the proviso are in themselves precise and unambiguous. They apply in their ordinary interpretation to anything done or omitted to be done by the clergyman in the performance of the duties of his office. The rule applicable to the construction of statutes, as laid down in the *Sussex Peerage Case* (1) by all the judges and approved by the learned Lords, was that "they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver." Is there any sufficient reason here for departing from that rule of construction and inserting words which are not to be found in the Act? The only ground for so departing is, using the words of Grove J. in *Richards* v. *McBride* (2), that "he must, as Parke B. said in *Becke* v. *Smith* (3), advance something which clearly shews that the grammatical construction would be repugnant to the intention of the Act and lead to some manifest absurdity." I have been unable to see the manifest absurdity which the Dean of the Arches was able to see.

I come, therefore, to the conclusion that Canon Thompson is protected by this proviso from the decree and monition pronounced by the Dean of the Arches, and consequently that the rule for a prohibition must be made absolute. My learned brothers, however, having come to the contrary conclusion, the rule must be discharged. I cannot say that I am sorry for this result. Perhaps it would be better that clergymen of the Church of England in such cases as the present should sacrifice their consciences, but that is not for a judge to decide. I have rather struggled to come to the same conclusion as my brothers, but I have felt that the words of the statute are too strong for me. In the words of Vaughan C.J. in *Harrison* v. *Burwell* (4), "Perhaps

(1) 11 Cl. & F. 85, at p. 143.
(2) 8 Q. B. D. 119.
(3) (1836) 2 M. & W. 191, at p. 195
(4) 2 Vent. 9, at p. 10.

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if we the judges had been makers of the law, this question had not been; but we are to proceed upon the laws as made, and cannot alter them: This is not a thing of our promotion, and this I speak to satisfy such as might object against us."

A. T. LAWRENCE J. In this case the Dean of the Arches and Alan Neville Banister and Emily Blanche Banister, his wife, shew cause against a rule for a writ of prohibition to prohibit all further proceedings in the matter of a decree and monition issued by the Court of Arches to the Reverend Henry Thompson whereby he was ordered to abstain from denying the Holy Sacrament to the said Alan Neville Banister and Emily Blanche Banister without lawful cause.

The case in the Arches Court is reported in [1908] p. 362, where the facts are fully stated. It will be sufficient for the present purpose to say that Mr. Banister married his deceased wife's sister, and having done so he and his wife have since the Act of 1907 been refused admission to the Holy Communion by Canon Thompson, the vicar of the parish in which Mr. Banister and his wife reside. Mr. and Mrs. Banister are members of the Church of England and are persons of established position and character in all respects other than that in dispute, namely, the effect of this marriage. The vicar sought to justify his refusal to admit them to Communion on the ground that their marriage made them within the meaning of the rubric "open and notorious evil livers" "so that the congregation were thereby offended." The question is, is this contention correct?

I confess my mind recoils from attributing such a meaning to this phrase in the rubric. It may be that before the Act of 1907 these words of the rubric might include such a case, but even then I am inclined myself to think that there would be a question of fact to be determined as to whether the congregation were offended by such persons taking part in the Communion. It may be that there are congregations who would entertain such a view. For the purposes of this judgment, however, I shall assume that before the Act of 1907 Canon Thompson could have justified his refusal to admit these parties to the Communion under the terms of this clause of the rubric. It is clear that by

the statutes of Henry VIII. marriage with a deceased wife's sister is forbidden, and since 5 & 6 Will. 4, c. 54, such marriages were not merely voidable during the lifetime of the parties, but were absolutely void. The earlier statutes declared such marriages to be void, as "contrary to the law of God." It seems to me that the words "contrary to the law of God" cannot be meant literally in this phrase, for the Pope was accustomed to grant dispensations in these cases, and Henry VIII. himself married under such a dispensation. It is impossible that either Pope or Parliament should dispense with or repeal a law of God in the true sense. The question whether they were or were not contrary to the law of God has been frequently discussed, but the Courts have uniformly declined to decide that question, saying it is sufficient that statutes have given that as the reason for forbidding them. In this country an Act of Parliament speaks the will of the sovereign power, and no earlier statute, rule, or canon contrary to the expressed terms of an Act of Parliament can have any force or validity. When, therefore, the Act of 1907 enacted that such marriages should not be void or voidable it repealed within the realm so much of all laws, civil or ecclesiastical, as said that such a marriage was void or voidable. To say that a marriage shall neither be void nor voidable is equivalent to saying that it is valid. It cannot be in the eye of the law both a valid marriage and an incestuous union without some express statutory provision to that effect. It is urged for the respondent (1) that the words of s. 1 of the Act of 1907 do not make the union in all respects a valid marriage, and it is suggested that this conclusion should be drawn from the words enacting that such marriage shall not be void or voidable "as a civil contract" by reason only of such affinity. It is said this enactment creates a new class of persons, whose relations are governed by a mere civil contract. I am not sure that I know what this means. If it means that the Act authorizes merely a contract like one engaging a gardener or a housekeeper, it clearly is not so. The word used is "marriage," and this denotes much more than such a contract. Marriage

(1) Throughout this judgment the "respondent" is used to indicate Canon Thompson, the respondent in the ecclesiastical cause.

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changes the status of the parties and involves a variety of rights and duties, capacities and incapacities, and the legitimacy of the issue. There would be no need for a single word or line of the residue of the statute if a civil contract in such a sense were all that was intended by the enacting words of s. 1. I do not think that this is the true effect of those words. The House of Lords has repeatedly said that in law marriage is a civil contract. The nature and effect of marriage at the present day is precisely the same whether it is contracted according to the rites of the Church or in any other lawful manner. And the Church of England has always recognized this. The marriage service of the Church of England affects only the conscience of the parties; it has no effect upon their status or their relations to one another or to third persons.

The position of the promoters at the time they were refused the Communion being that of persons lawfully married, they had by virtue of the statute of 1 Edw. 6, c. 1, s. 8, a right to admission to the Communion unless disqualified from receiving it for "lawful cause." I do not think it is possible to say that a lawful marriage can in itself constitute such lawful cause. The Dean of the Arches has held that they were not in fact open and notorious evil livers, and I agree with him. The correspondence shews that the respondent shrank from saying that they were. I think it is impossible to say that they are so constructively by reference to the historical fact that such a relation was at one time classed as incest and declared to be contrary to the "law of God." If the use of the phrase "as a civil contract" in s. 1 has any special meaning in this ill-drawn Act, I think it may have reference to s. 4, which leaves clergymen of the Church of England open to spiritual censure if they contract such marriages themselves; whether this provision was inserted to discourage such marriages among the clergy, or in consequence of views held by some sections of the clergy, I do not know. It is clear that s. 4 is wholly superfluous if the words "civil contract" in s. 1 have the effect contended for by the respondent. There is no corresponding provision with regard to laymen, nor is there any provision that a clergyman performing the marriage service upon a man with his deceased wife's sister is open to

any censure. It is clear that before the Act he would have committed an ecclesiastical offence by knowingly performing the service in such a case. There is no provision dealing with this matter now (the proviso only applies to cases in which "he would not have been liable" before the Act), and it is plain that none was needed, for immediately the law of England made such a marriage lawful neither the parties marrying nor the person who performed the ceremony of marriage needed any protection. Free men need no statute to protect them for doing lawful acts.

This brings me to the fuller consideration of the proviso. Sect. 1 of the Act contains a proviso the generality of which was much relied upon for the respondent. It was said to protect the respondent from any suit, penalty, or censure for refusing the sacrament in this case. I do not think it has the meaning contended for. It is a proviso upon the enactment making it lawful to contract such a marriage. Before the Act the vicar, as part of the duties of his office, was bound to perform the marriage service upon all persons dwelling in the parish who lawfully presented themselves: *Argar* v. *Holdsworth* (1); from having this duty extended by the enactment to the case of a man seeking to be married to his deceased wife's sister the proviso does save him, and from the duty to do all acts incidental thereto, such as publishing the banns or entering the marriage in the marriage register. It does not, as it seems to me, extend to entitle him as between himself and such spouses when once married to regard the lawful marriage as non-existent, which is what he seeks to do in this case. That the words in this proviso "anything done or omitted to be done by him in the performance of the duties of his office" have relation to things done or omitted to be done with regard to the ceremony of marriage seems to me to follow when they are read secundum subjectam materiem, which is marriage. A clergyman has no duties to perform having any connection with marriage save those relating to the marriage ceremony. Further, this seems to be clearly indicated by the words of the next proviso, which speaks of "such marriage service." No marriage service had been previously expressly mentioned, and

(1) 2 Lee, 515.

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as a matter of construction I think the word "such" points to the "duties" being impliedly those connected with the performance of the marriage service, and not, as suggested by the respondent's counsel, duties wholly apart from such marriage service. It is true the words of the first proviso are wide; it may also be that the words of the second proviso are copied by the draftsman from the Matrimonial Causes Act of 1857, as suggested by Mr. Duke, but such consideration ought not to govern the construction of the Act. The words of the whole Act must be read as they stand, and it is a well-established canon of construction to limit the words of a proviso to the enactment to which it is appended. This proviso, as it seems to me, leaves the clergyman in relation to a man, and in relation to that man's deceased wife's sister, where he stood before until they are once married. He can refuse, or neglect, to marry them. He can refuse, or neglect, to publish their banns. He can refuse them the use of his church for their marriage, and he will be subject to no suit, penalty, or censure, although such a marriage is now lawful, for the proviso protects him when refusing that which would otherwise be their right. The construction which he asks us to put upon the proviso goes further. He asks us to disregard the plain fact that a lawful marriage has been solemnized between these parties, and that they are now lawful spouses, legally cohabiting and entitled, in the absence of express words depriving them thereof, to all the rights of ordinary citizens. He seeks to disregard this fact, and to add to the proviso, after the words "if this Act had not been passed," the words "and no marriage had been solemnized." Such a construction would create a variety of absurd results. I do not think it necessary to set out all of these. The Dean of the Arches gave two instances which Mr. Duke disputed. The one was a clergyman's refusal to recognize the father in such a case in making entries in the baptismal register; the other, his insisting on solemnizing the marriage of an infant daughter without the consent of the father. If "anything done or omitted to be done in the performance of the duties of his office" includes, as the respondent asserts it does, the refusal to admit to Holy Communion, I am unable to see how it can fail to include those

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instances given by the judge below. Mr. Duke, while denying that it did so, was wholly unable to formulate any proposition or construction of the words which would make them include the one case and not the others. It seems to me that if the proviso enabled the vicar to excommunicate this couple from the Holy Sacrament it would also enable him to refuse them Christian burial, a power which in many small parishes would have the effect of leaving such persons, if poor, to be buried like dogs under a hedge. (1) I cannot believe this proviso conferred upon clergymen any such amazing powers. Mr. Duke had to admit in his very able argument that his construction of the Act created a new class of married persons with a different ecclesiastical status, liable at the whim of any clergyman to be repelled from the most sacred sacrament of their Church. I cannot attribute to the Legislature such a meaning. In my opinion the rule should be discharged.

W. H. G

Canon Thompson appealed.

The appeal was heard in November last.

Duke, K.C., P. V. Smith, and *Hansell,* for the appellant. The main point to be considered is whether, if the Deceased Wife's Sister's Marriage Act, 1907, had not been passed, Canon Thompson could have been made the subject of proceedings in an Ecclesiastical Court; that is the only way in which the effect of the proviso in s. 1 can be properly tested. Assuming, then, that the Act had not been passed, it is clear (1.) that a brother-in-law and sister-in-law living together matrimonially are guilty of incest; (2.) by the Canons of the Church the clergy are required to repel from Holy Communion all persons who to their knowledge are guilty of incest; (3.) by the rubric to the

(1) Note.—This simile is inaccurate. It ignores the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), which some may think provides a satisfactory substitute for the Burial Service of the Church of England. It was intended to express the sentiments of the ordinary peasant who regards the Burial Service, which has been read alike over his forbears and over the magnates of his county, as a precious heritage—a symbol of that equality which he has found it so hard to realize in life.—A. T. L.

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Communion Service the clergy are empowered to repel from Holy Communion every "open and notorious evil liver"; (4.) by the terms of 1 Edw. 6, c. 1, s. 8, the minister may for "lawful cause" refuse the sacrament to a parishioner. These four propositions were incontestable at the time the Act of 1907 was passed, and so far as the clergy are concerned are still incontestable by virtue of the proviso.

There is no express repeal of the earlier Acts by the Act of 1907, and no repeal can be implied.

[In elaborating these propositions counsel repeated the arguments used in the Court below; they also criticized and commented on the judgments of the Divisional Court and of the Dean of the Arches' Court. (1) The case was argued on the assumption that the promoters had been married after the passing of the Act of 1907. The following additional cases were also cited: *Burgess* v. *Burgess* (2), *Randall* v. *Vowles* (3), *Reg.* v. *Monck* (4), and *Reg.* v. *Inhabitants of Wye.* (5)]

Danckwerts, *K.C.*, *Errington*, and *Franey*, for the promoters, repeated the arguments used in the Court below, and continued:— A prohibition will not lie to prevent an Ecclesiastical Court from misconstruing a rubric, it will only lie for misconstruction of a statute. The Ecclesiastical Court has not exceeded its jurisdiction, and no prohibition ought to be granted. It is said that the fact that the Dean of the Arches misconstrued a section of the Act of 1907 is sufficient reason for granting a prohibition: *Gould* v. *Gapper* (6); but although the secular judges were to construe statutes, the Ecclesiastical Courts could interpret statutes incidental to their jurisdiction: 2 Co. Inst. 613; *Ackerley* v. *Parkinson.* (7) An action upon the case will lie against a clergyman who refuses the sacrament: *Henley* v. *Burstow* (8); 1 Edw. 6, c. 1, s. 8, revived by 1 Eliz. c. 1, s. 5. The parish priest has no power to excommunicate people in this way. A parishioner has a right to partake of the Holy Communion;

(1) [1908] P. 362.
(2) (1804) 1 Hagg. Cons. 384.
(3) Not reported. See Phillimore's Ecclesiastical Law, 2nd ed., vol. 2, p. 1070.
(4) (1877) 2 Q. B. D. 544.
(5) (1838) 7 Ad. & E. 761.
(6) (1804) 5 East, 345.
(7) (1815) 3 M. & S. 411.
(8) (1665) 1 Keb. 947.

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Jenkins v. *Cook.* (1) In case of incest after a marriage ceremony no punishment followed under ecclesiastical law until regular proceedings had been taken: Decret. Greg., lib. iv., tit. xix., c. 3: Decreti, part 2, causa 35, qu., 1 ch. 1. The marriage was good till it was declared to be void, and had to be declared void before sentence of punishment was pronounced: *Blackmore* v. *Brider* (2); *Dunstan* v. *Earl of* —— (3); *Chick* v. *Ramsdale* (4); *Griffiths* v. *Reed* (5); followed since the Matrimonial Causes Act, 1857, in *Andrews* v. *Ross.* (6) The power of the Ordinary to institute proceedings still exists: *Hebbert* v. *Purchas.* (7) Marriage with a deceased wife's sister has never been generally agreed to be beyond God's law. A dispensation could be obtained to enable such a marriage to take place: *In re Bozzelli's Settlement.* (8) By the 25th Article of Religion marriage was excluded from the category of sacraments and it was treated as an ordinary civil contract: *Turner* v. *Meyers* (9); *Lindo* v. *Belisario* (10); *Dalrymple* v. *Dalrymple* (11); *Reg.* v. *Millis* (12); *Beamish* v. *Beamish.* (13)

The Ecclesiastical Courts cannot entertain these questions, for they have become purely matters for secular jurisdiction. These Courts had no power of themselves to bind the laity: *Middleton* v. *Crofts.* (14) The question before this Court is simply what has the Legislature done? The appellants' claim depends on rubrics and canons which, as well as the validity of the marriage itself, are merely creations of statute law. Our law considers marriage in no other light than as a civil contract: *Durham* v. *Durham* (15); and the effect of the Act of 1907 is to validate a marriage with a deceased wife's sister in every respect, and persons cannot be notorious evil livers because they have contracted such a marriage. Every reason for saying

(1) 1 P. D. 80.
(2) (1816) 2 Phillim. 359.
(3) Memorials of St. Dunstan (Great Britain Chronicles and Memorials, No. 63), p. 200.
(4) (1835) 1 Curt. 34.
(5) (1828) 1 Hagg. Eccl. 195.
(6) (1888) 14 P. D. 15.
(7) (1871) L. R. 3 P. C. 605, 650.
(8) [1902] 1 Ch. 751.
(9) (1808) 1 Hagg. Cons. 414.
(10) 1 Hagg. Cons. 216.
(11) 2 Hagg. Cons. 54, 67.
(12) 10 Cl. & F. 534.
(13) 9 H. L. C. 274.
14) (1736) 2 Atk. 650, 659
(15) (1885) 10 P. D. 80.

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that the parties to a marriage which is valid under the Deceased Wife's Sister's Marriage Act, 1907, are notorious evil livers applies equally to persons whose marriages are rendered valid by the Colonial Marriages Act, 1906, and it is admitted that such colonial marriages are legal for all purposes. People in that position cannot be guilty of incest because they are within the prohibited degrees, for those degrees are purely statutory and can be altered by statute. The proviso in the Act of 1907 is not inserted in the Act of 1906 because there was no probability that an English clergyman would be called upon to perform such a marriage ceremony. The proviso only preserves clergymen from performing duties connected with the marriage service. It has no operation on such questions as repelling from Holy Communion. A proviso must be construed with reference to the preceding part of the section to which it is appended and must be limited to the subject-matter in hand: *Ex parte Partington* (1); *In re Brockelbank* (2); *Hill* v. *East and West India Dock Co.* (3)

Rowlatt (*Sir W. S. Robson, A.-G.*, with him), for the Dean of the Arches. The question of prohibiting the Ecclesiastical Courts has in times past been a burning one, and a large measure of jurisdiction has been assumed by the lay Courts, but the limits of this jurisdiction are settled by authority. The lay Court will grant prohibition where the Ecclesiastical Court in dealing with an ecclesiastical matter misconstrues a statute or goes wrong upon a matter of common law; but it will not grant prohibition where in an ecclesiastical cause the question is simply one of the construction of the rubrics, and this procedure does not enable the lay Court to act as a Court of appeal from the Ecclesiastical Court so as to correct any irregularity or even injustice which may have been done by the Ecclesiastical Court, if done in the exercise of its jurisdiction: *Gould* v. *Gapper* (4); *Veley* v. *Burder* (5); *Mackonochie* v. *Lord Penzance.* (6) Therefore to determine whether prohibition will lie in this case it is essential to see precisely what the Dean decided. After

(1) 6 Q. B. 649, 653.
(2) 23 Q. B. D. 461.
(3) 9 App. Cas. 448, 456.
(4) 5 East, 345, 371.
(5) (1841) 12 Ad. & E. 265, 312.
(6) (1881) 6 App. Cas. 424, 443.

referring to various classes of marriages which were disapproved ecclesiastically on the highest ground as contrary to God's law and were yet not regarded as ecclesiastically void, he says: "My duty is confined to ascertaining whether those who have contracted such a marriage are open and notorious evil livers and are offending the public conscience by their evil life. Taking the fullest account of the limiting effect of the words of the statute, and putting at its highest the divergence which the Act may have created between the action of the State and the rule of the Church of England, I find it impossible to say that these persons, lawfully married according to the law of the land, can by any reasonable use of language be so described merely because they are living together as man and wife." Therefore upon every question of the statute the learned judge has gone the whole way with the appellant, and he has held that upon any interpretation of the statute the parties to this marriage are not notorious evil livers. That depends simply upon the construction of the rubric, for it is common ground that "lawful cause" in 1 Edw. 6, c. 1, s. 8, is to be construed by reference to the rubric, and it is not for the lay Court in an ecclesiastical cause to construe the rubrics. Prohibition therefore will not lie. The question who is a notorious evil liver is entirely an ecclesiastical matter, and the proper mode of obtaining a review of the Dean's decision was by appeal to the Privy Council. Even though the Dean may have misdirected himself by taking a wrong view of the rubric, that is not a ground for prohibition, and the fact that the Prayer Book is attached to the Act of Uniformity does not affect the matter; otherwise all ritual cases would come into the civil Courts: see Coke's Institutes, 2nd part (Articuli Cleri), pp. 601, 613.

[FARWELL L.J. To call a man a notorious evil liver might warrant an action for slander, and if a thing affects a man's civil status as well as his ecclesiastical status, is not that a matter for the temporal Courts?]

It may be that if the decision had been the other way it might have been said that the Dean had enlarged the effect of the rubric so as to bring in persons who were not within it, and in that case prohibition might have lain.

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With regard to *Fenton* v. *Livingstone* (1) it is enough to say that the position created by the Act of 1907 differs toto cœlo from the position under Lord Lyndhurst's Act. Marriage, however celebrated, is a civil contract, and if it is valid by the law of the land it must be recognized as valid by the Church. On the assumption that but for the Act of 1907 the parties to this marriage would have been notorious evil livers, that Act altered the law and impliedly altered the duties of the office of a clergyman, and therefore the proviso was wanted to protect any clergyman who might have conscientious scruples as to assisting at any such marriage. But the proviso is a proviso upon the alteration of the law, and the exemption from liability to penalty or censure for anything done or omitted to be done by him in the performance of the duties of his office relates only to duties as to which the Act has effected some change.

Duke, K.C., in reply.

Cur. adv. vult.

Dec. 11. COZENS-HARDY M.R. This appeal from a decision of the Divisional Court discharging a rule nisi for a prohibition raises the important question whether a clergyman of the Established Church of England is justified in repelling from the Holy Communion baptized and confirmed lay members of that Church on the sole ground that they have contracted a marriage which is since the Deceased Wife's Sister's Marriage Act, 1907, a valid marriage, and are cohabiting as husband and wife. Canon Thompson, their parish clergyman, refused to admit them to the Communion. Proceedings were taken in the Court of Arches, and Canon Thompson was admonished. He did not appeal to the Privy Council, but he applied to the secular Court of King's Bench for a writ of prohibition on the ground that Sir L. Dibdin, the Dean of the Arches, had, upon undisputed facts, wrongly construed the Act of 1907.

For the purpose of my judgment I assume, without in any way deciding, that it is a case for prohibition in a temporal Court and not for appeal to the Privy Council. The obligation to decide in reference to matters of this nature is distasteful to me. I dislike

(1) 3 Macq. H. L. 497.

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the intrusion of the secular state into realms where conscience claims to hold undisputed sway, and I have a difficulty in regarding a communicant in any other light than as one who is obeying his Lord's command and enjoying a spiritual privilege. Nevertheless it is my duty to overcome all feelings of that nature and to consider the question before us as a lawyer.

I start with the proposition that by the statute of 1 Edw. 6, c. 1, s. 8, a clergyman is bound not "without a lawful cause" to deny Communion. In other words, a parishioner has a statutory right to require to be admitted to Communion. It is a right which would support an action on the case at common law—*Harris* v. *Hicks* (1)—or proceedings in an Ecclesiastical Court—*Jenkins* v. *Cook* (2)—against the clergyman, and it would be for him to allege and prove a "lawful" cause to justify his refusal. The rubric in the Communion Service, which has statutory effect by virtue of the Act of Uniformity, provides that if any one who intends to be partaker of the Holy Communion "be *an open and notorious evil liver* or have done any wrong to his neighbours by word or deed *so that the congregation be thereby offended*" the clergyman may repel him. And it is upon this rubric mainly, but partially also upon canon 109, that Canon Thompson relies.

It is necessary to consider carefully what was before the Act of 1907 and what is now the legal position of a domiciled Englishman who has gone through the ceremony of marriage with his deceased wife's sister. By statutes passed in the reign of Henry VIII., which I need not refer to in detail after the judgments of the Court of Queen's Bench in *Reg.* v. *Chadwick* (3) and of the House of Lords in *Brook* v. *Brook* (4) and in *Fenton* v. *Livingstone* (5), marriages of a certain class, including expressly a marriage of a man with his deceased wife's sister, were declared to be prohibited by God's law and were made illegal and void. That was the then view of the Legislature. It is not for any Court to consider whether they were in truth prohibited by God's law. It suffices that they were prohibited by statute. It was not merely illicit cohabitation. It was incest. The Court spiritual

(1) 2 Salk. 548.
(2) 1 P. D. 80.
(3) 11 Q. B. 173.
(4) 9 H. L. 193.
(5) 3 Macq. H. L. 497, at p. 533.

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would have "censured" the parties and ordered them to withdraw from cohabitation. Such a marriage before Lord Lyndhurst's Act is often spoken of as voidable. But the true view is that it was absolutely void ab initio, although the only Court competent to declare it void was the Ecclesiastical Court, and the jurisdiction of that Court ceased on the death of either party: see *Fenton* v. *Livingstone*. (1) Lord Lyndhurst's Act made all future marriages of this class "absolutely null and void" without the sentence of any Ecclesiastical Court.

In this state of the law, I think it was not only competent to the clergyman, but the duty of the clergyman, to repel the parties from the Communion, if the facts were notorious and the congregation were thereby offended.

In 1857 Parliament deprived the Ecclesiastical Courts of all jurisdiction in matters relating to marriage and created a new Court for the purpose of exercising such jurisdiction. Thenceforward marriage became a purely secular question. By the Colonial Marriages (Deceased Wife's Sister) Act, 1906, marriages of this nature between persons domiciled in a colony or possession where such marriages were legal are declared legal for all purposes within the United Kingdom. This was a partial repeal of the statute of Henry VIII. I may observe that there is no provision in that Act for the protection of the English clergyman, because it deals only with marriages celebrated abroad. But in the Act of 1857, which authorized the remarriage in this country, in certain events, of divorced persons in the churches of the Established Church, a limited protection is given to a clergyman who conscientiously objects to perform the marriage ceremony, which otherwise would have been obligatory upon him.

In 1907 Parliament amended the law relating to marriage with a deceased wife's sister, but left all other marriages within the prohibited degrees untouched. The enacting part of s. 1 is emphatic: "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable as a civil contract by reason only of such affinity." What was the result? Surely to make that lawful matrimony

(1) 3 Macq. H. L. 497.

which before was illicit cohabitation and incest, with all its consequences. Either of the spouses can now obtain a decree for restitution of conjugal rights. It is absurd to suppose that the Court can thus enforce an immoral relation. Marriage, in the view alike of the Courts of common law and of the Ecclesiastical Courts, is not a sacrament: see Article XXV. It is a contract of a peculiarly solemn kind, affecting the status of the parties. But it is one and the same thing whether the contract is made in church with religious vows superadded, or whether it is made in a Nonconformist chapel with religious ceremonies, or whether it is made before a consul abroad, or before a registrar, without any religious ceremonies. So far as I am aware, the Established Church has never refused to recognize any marriage which by our law is valid as being otherwise than a good marriage for ecclesiastical purposes. In my opinion the words "as a civil contract" neither add to nor diminish the effect of the rest of the section. The Act of 1907 by necessary implication repeals so much of the statute of Henry VIII. as includes a deceased wife's sister within the prohibited degrees. I may point out that the Act of 1907 distinctly contemplates and authorizes the celebration of such marriages in a church or chapel of the Church of England and in accordance with the marriage service, and it is impossible to conceive that Parliament can have authorized any marriage which it deemed incestuous to be celebrated with all the sanctions of religion. Parliament plainly treated such marriages as neither incestuous nor prohibited.

If I am right in the view which I have expressed as to the effect of the legislation down to and including the Act of 1907, it seems to me preposterous—nay, shocking—to suggest that husband and wife are "open and notorious evil livers" merely because they live together as husband and wife. I am not sure that they might not be regarded as "open and notorious evil livers" if they declined to cohabit, which is what the old Ecclesiastical Courts would have ordered them to do.

It is now necessary to consider the first proviso to s. 1, upon which Canon Thompson relies. It is in the following words: "Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether

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civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this Act had not been passed." I do not feel any serious difficulty in construing this proviso. It is not a separate enactment. It is a proviso upon the enacting clause, and according to ordinary rules of construction it must prima facie be limited in its operation to the subject-matter of this enacting clause, namely, the marriage contract. Prior to the Act the clergyman could not have been required to marry persons standing in this relation. But for the proviso the clergyman would, after the Act, have been bound to proclaim the banns, to solemnize the marriage, and to register it in the parish register: *Argar* v. *Holdsworth.* (1) The proviso relieves him from these obligations, if he so desires, and gives him the relief in a wider and more complete form than is found in s. 57 of the Act of 1857. To hold that the clergyman is at liberty to act in the performance of the duties of his office, generally, as if the Act had not been passed is, in my opinion, impossible. Surely he cannot marry one of the spouses during the life of the other spouse to a third person, although before the Act he might have done so. And many other instances might be given. In my opinion it is wholly unreasonable to hold that the effect of the proviso is to enable the clergyman to say to Mr. Banister, "Before the Act you would have been 'notorious evil livers,' and on that ground alone I could have refused to admit you to the Communion. You are not now 'notorious evil livers,' but, nevertheless, I claim the right to treat you as such, and to refuse to admit you to the Communion ; and I make this claim with full knowledge of the fact that I, as your parish clergyman, am the only person from whom you can demand that which the law of the land entitles you to receive."

There was a learned argument before us as to the meaning and effect of the Canons of 1603, but I prefer not to express any opinion on the point. I desire to adopt the language of the Dean of the Arches: "As the present case arises directly under the rubric, which has statutory authority, it is not material to consider the legal effect of the Canons of 1603, which bind the

(1) 2 Lee, 515.

clergy re ecclesiastica, but do not, of their own force, ordinarily bind the laity, or how these Canons are to be regarded in relation to a matter which gravely affects both clergy and laity." Neither do I think it material to consider s. 4 of the Act of 1907, which deals with the case of a marriage of a clergyman with his deceased wife's sister. Suffice it to say that nothing in that section assists the appellant.

The result is that I agree with the view taken by the Dean of the Arches as to the true operation of the statute of 1907, and that I agree with the majority of the judges in the Divisional Court in holding that no case for a writ of prohibition has been established.

The appellant must pay the costs of the appeal.

FLETCHER MOULTON L.J. This case raises questions of grave and general importance as to the status and rights of persons who have contracted marriage with a deceased wife's sister and as to the duties of the clergy of the Church of England with regard to them. It comes before the Court in the form of an appeal against a refusal of the Court of King's Bench to make absolute a rule nisi for a prohibition to the Principal of the Arches Court of Canterbury against further proceeding in the matter of a certain decree and monition made and issued by that Court admonishing the defendant to the suit from denying the Holy Sacrament to the promoters of the suit, who were persons who had contracted such a marriage. The appellant claims that in deciding that such admonition should issue the Principal of the Arches Court of Canterbury had put a wrong construction upon the Deceased Wife's Sister's Marriage Act, 1907, and that consequently the Supreme Court could and should prohibit him from proceeding further in the matter. From the nature of the case it will be necessary to deal with legal questions as to the rights and duties of the clergy and the laity in connection with the administration of the Holy Sacrament, but before considering this part of the case it is necessary to ascertain the law as to such marriages both before and since the passing of that Act.

There is substantial agreement as to the state of the English

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marriage law down to a date immediately before the passing of the Act of 1907. Before Lord Lyndhurst's Act marriages with a deceased wife's sister were by English law incestuous and void by reason of their having been declared to be contrary to God's law by 28 Hen. 8, c. 7. This was decided in a Court of Error in *Reg.* v. *Chadwick* (1) and in the House of Lords in *Brook* v. *Brook* (2), and these decisions shew incontestably that it is solely by reason of such marriages being included in the list of prohibited marriages contained in that statute that they were thereafter void by English law. But although by reason of that statute such marriages were void, the Ecclesiastical Courts required that they should be declared void by sentence of the Court before they could be treated as a nullity, and they permitted this to be done only during the lifetime of both parties. It followed, therefore, that if the marriage was not annulled before the death of one of the parties it was equivalent to a valid marriage for all purposes, such as legitimacy of the children, inheritance, &c. It is not necessary to cite cases in support of this proposition, for it appears sufficiently from the recital to Lord Lyndhurst's Act itself, which commences thus: "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court pronounced during the lifetime of both the parties thereto." But when such a marriage was brought before the Ecclesiastical Court for declaration of nullity it was declared null and void ab initio. This was logical and necessary, for it was void from its inception, and none the less so because steps were necessary to enable that fact to be recognized legally and thus to entail its legal consequences. This explains the undoubted fact that, although an Ecclesiastical Court could not annul such a marriage after the death of one of the parties, it could censure the survivor for having committed incest by entering into the marriage. The marriage had been void from the first, and the criminality of the survivor in having cohabited thereunder was unaffected by the fact that it was too late to annul the marriage by due process of law so as to affect third persons by reason of the death of the other party.

(1) 11 Q. B. 173. (2) 9 H. L. 193.

Lord Lyndhurst's Act seriously altered the law as to such marriages. While validating those that had been contracted in the past, it enacted that in the future they should be "absolutely null and void to all intents and purposes whatsoever." It followed that all such marriages contracted after the passing of that Act might under all circumstances be treated as of no force and validity as well by the parties thereto as by third persons. It was therefore no longer necessary to get them formally annulled by sentence of an Ecclesiastical Court. The law remained in this state until 1906, when the Colonial Marriages (Deceased Wife's Sister) Act, 1906, was passed, which declared "legal for all purposes" such marriages in the case of parties domiciled in parts of the British possessions where such marriages were legal at the date of the marriage. In the next year the Deceased Wife's Sister's Marriage Act, 1907, was passed, which applies to such marriages, whether past or future and whether contracted within the realm or without. It is upon the interpretation of the 1st section of this Act that the decision of this case must turn. In form it consists of a main enacting clause followed by three provisoes. The language used throughout presents marked peculiarities, and there is no doubt that it requires to be examined carefully to ascertain the true meaning and scope of the Act of which it forms the most important part. The main enacting clause is in the following terms:—"No marriage heretofore or hereafter contracted between a man and his deceased wife's sister within the realm or without shall be deemed to have been or shall be void or voidable as a civil contract by reason only of such affinity." All are agreed that the meaning of this language is that such a marriage is rendered valid as "a civil contract," and that the peculiar terms employed have been chosen by reason of the history of the matter and the language of preceding legislation to which I have already referred. The only difference of view as to the interpretation of this enactment is as to the meaning and effect of the phrase "as a civil contract." The appellant contends that the effect of these words is to give to the marriage only a validation sub modo and not a complete validation so as to render it good for all purposes. So far as form is concerned it would appear prima facie that the appellant had the advantage

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here, for from a logician's point of view the introduction of the words "as a civil contract" would appear to qualify and therefore to limit the validation. But it is impossible to rest content with such a process of reasoning. It is based purely on considerations of form, and the procedure by which the language of Acts of Parliament is determined often makes such considerations of little value. The final form of an Act represents the work of no single draftsman. Amendments using different and even inconsistent phraseology may be moved from different parts of the House and incorporated into the Bill, and in view of the fact that the parties proposing them may not be fully acquainted with the law, and that there are no arrangements for redrafting a Bill after substantial amendments have been made so as to render its language consistent, it becomes necessary for the Courts to examine closely the final language actually adopted, more especially in the case of an Act with so contentious a history as the one in question. Cases could be given where even in the same Act provisions couched in widely divergent language have been held by the Court of final appeal to mean precisely the same thing, although unquestionably the parties who proposed the variation of phraseology must have done so in the belief or hope that they would be taken to have different meanings. It is therefore necessary to examine whether in any material respect or at all this validation of a marriage as a civil contract differs from a validation for all purposes.

The contract of marriage is a contract whereby a man and a woman accept the relationship of man and wife, the one to the other, and the status and obligations which flow therefrom. The procedure by which that contract can legally be made may vary widely, but the result is in all cases the same. To the law there is only one contract of marriage. It may be solemnized in a church by the parish clergyman with the rites of the Church of England, the parties thereto being persons holding the tenets of that Church, or it may be made before a registrar (who is a purely civil official), the parties thereto being of no religious belief whatever. The result is one and the same in every respect known to the law. The obligations under the contract, the

remedies open to the parties in case of non-fulfilment of the obligations, the period of its duration, and the status acquired thereby are absolutely identical, however the marriage be made. Seeing, then, that a marriage before a registrar between two persons of no religious belief is for every purpose known to the law of precisely the same effect as a marriage solemnized with the most elaborate ritual and the gravest religious sanction (say, for instance, in a church where marriage is accounted a sacrament itself), it is impossible, to my mind, to escape the conclusion that for all purposes known to the law marriage is a civil contract and only a civil contract; and I have looked in vain through all the decisions to which we have been referred during the argument of this case to find any authority for holding that marriage is in the eye of the law anything other than or beyond this. It is true that Lord Stowell in *Turner* v. *Meyers* (1), referring to a marriage solemnized in church, speaks of it as "a civil contract as well as a religious vow," and it may well be that persons whose marriage is solemnized in church according to the impressive service of the Church of England and with the direct appeal to a religious sanction which that service carries with it may thereby bind themselves in a very full and complete way to perform the duties and obligations of marriage. But whether this be so or not is a matter with which the law can have nothing to do. It is a matter between a man and his conscience and his religious beliefs, which neither adds to nor takes away from the duties and other consequences recognized by the law as flowing from a marriage contracted in purely civil form. I therefore come to the conclusion, and hold, that the words "as a civil contract" constitute no limitation whatever on the validation of these marriages by the Act. The effect of the enactment would have been the same if the validation had been expressed to be "for all purposes," which is the phraseology adopted in the Colonial Marriages (Deceased Wife's Sister) Act, 1906. In such a phrase "purposes" means purposes known to the law and over which it has cognizance, and which therefore can be affected by legislation. For all such purposes marriage is, as I have said, only a civil contract

(1) 1 Hagg. Cons. 414.

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which can be entered into without any appeal to religious sanction and the effect of which depends in no way on religious considerations.

I confess that the presence of the words "as a civil contract" does not much surprise me or cause me much difficulty in coming to the above conclusion. The history of the Act is in the memory of all of us, as are also the fierce conflicts which raged both within and without the Houses of Parliament on the subject of such marriages for many years before it became law. I neither know nor do I care whether these words formed part of the Bill as first introduced or were inserted at some later stage, nor do I know or care from which of the parties in the controversy they came. On the one hand, minds of strong anti-clerical bias may well have wished to see marriage legislatively treated as a civil contract, and, on the other hand, minds with a clerical bias may have wished the words to appear in the Act, in the hope that they would be taken to indicate that the Legislature did not presume to interfere with the religious sanction which Churches give to marriage. All this is matter of speculation which has no bearing on the result. The words used in the Act are adequate to make the parties lawfully married to one another, and to that phrase the law attaches but one signification.

The next question is to determine the effect which this enactment has had upon the earlier legislation which was in force at the date at which the Act was passed. The Act does not expressly alter or repeal any pre-existing statutes, for there is no repealing section or schedule of Acts repealed. But it is needless to say that statutes may be as effectively altered or repealed by implication as by direct mention, and we have now to examine whether any of the previous enactments are inconsistent with the provisions of this Act, for if and so far as this is the case they stand repealed.

It is scarcely necessary for me to say that the direct consequence of the interpretation which I have put upon the principal enactment is that it impliedly repeals Lord Lyndhurst's Act. That Act rendered such marriages null and void to all intents and purposes. This Act renders them valid for all purposes. But the somewhat more difficult question is its effect upon

the statutes of earlier date than Lord Lyndhurst's Act. We have seen that under the provisions of 28 Hen. 8, c. 7, these marriages were declared and thereby (so far as the laity were concerned) were made contrary to God's law, and became incestuous and void. That both these epithets were legally applicable to them by reason of this statutory prohibition appears not only from the opinions delivered in the House of Lords in *Brook* v. *Brook* (1), but from the procedure of the Ecclesiastical Courts, in which for centuries these marriages were invariably styled and proceeded against as incestuous marriages and annulled as such. The Legislature now makes these marriages valid, whether contracted before or after the passing of the Act. It therefore permits and gives full legislative sanction to future marriages with a deceased wife's sister, and certainly makes it obligatory on all registrars to perform them when required to do so. Nay, it does more than this. The second proviso (which applies to cases where a minister has refused to perform such a marriage) reads as follows: "Provided also that when any minister of any church or chapel of the Church of England shall refuse to perform such marriage service between any persons who, but for such refusal, would be entitled to have the same service performed in the said church or chapel, such minister may permit any other clergyman in holy orders in the Church of England entitled to officiate within the diocese in which such church or chapel is situate to perform such marriage service in such church or chapel." It therefore contemplates and countenances these marriages being performed in churches and chapels of the Church of England according to the rites of that Church, and, indeed, recognizes that parishioners have a right to be so married in their parish church, subject only to a personal right of the minister of that church to refuse to perform the service or to let any one else do so. Is it possible to contend that this legislation leaves the marriages still incestuous and unlawful? To my mind the suggestion is outrageous. It is impossible to suppose that the law would even permit civil officials to take part in solemnizing marriages that were still by law incestuous and unlawful. But the monstrous character of

(1) 9 H. L. 193.

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the suggestion is even more striking if we consider that it authorizes these marriages to be performed in churches with the rites of the Church of England. Let me call attention to two passages only of the marriage service and the accompanying rubrics.

"*Then shall the priest join their right hands together, and say,*

Those whom God hath joined together let no man put asunder.

Then shall the minister speak unto the people,

Forasmuch as M. and N. have consented together in holy wedlock and have witnessed the same before God and this company and thereto have given and pledged their troth either to other, and have pledged the same by giving and receiving of a ring, and by joining of hands; I pronounce that they be man and wife together in the name of the Father, and of the Son, and of the Holy Ghost. Amen."

This is followed by a blessing, and later on by a prayer that they may be fruitful in procreation of children, and may live together in godly love and honesty. Is it conceivable that when the Legislature contemplated and provided for the use of this service it kept in force and retained on the Statute Book an enactment which made the marriage contrary to God's law and incestuous, and thereby bound all persons, including the clergyman, so to treat it? To my mind it would be impossible to imagine a more conclusive case of implied repeal, and I have no hesitation whatever in coming to the conclusion that the effect of the Deceased Wife's Sister's Marriage Act, 1907, is to remove marriages with a deceased wife's sister from the list of incestuous and unlawful marriages forbidden by 28 Hen. 8, c. 7, and to leave the law in the same condition as if such marriages had never been included in that list.

A consideration of the function and duties of the Ecclesiastical Courts prior to 1857 and of the Divorce Court since that date leads to the same conclusion. One of the obligations of marriage is cohabitation, and if one of the parties to a marriage neglects or refuses to perform that obligation without lawful cause that party commits a matrimonial offence, and on application to the Court will be ordered to resume cohabitation. In the old days obedience to such an order might be enforced by

attachment, and although in more recent times this has been altered by the Matrimonial Causes Act, 1884, the change is not in the obligations of the parties or in the duty of the Court to enforce these obligations and to punish continued refusal to perform them, but solely in the mode of enforcement of its decrees. Now it is clear beyond all contest that since the passing of the Deceased Wife's Sister's Marriage Act, 1907, the parties to such marriages stand before the Courts in all respects in the same position as the parties to any other marriage. The law therefore regards them as under the obligation of cohabitation and will enforce that obligation by its decrees. Is it conceivable that the Legislature could have given full permission to contract such marriages in the future and thus have put upon the Courts the duty to enforce the obligations of cohabitation in the case of such marriages if it retained on the Statute Book enactments which made such marriages incestuous and contrary to God's law? The marriage contract would be for a purpose which by the law would still be regarded as immoral; and this must be fatal to all contracts, whether we call them civil contracts or not. Moreover, the old powers and duties of the Ecclesiastical Courts to punish and to forbid the parties to incestuous marriages to continue to cohabit still remain; and if the enactments which make these marriages contrary to God's law, and therefore incestuous, are unrepealed, we should have the grotesque spectacle of one Court enjoining cohabitation and the other forbidding it as being incestuous.

To my mind the only interpretation which can be put upon the principal enactment in the Deceased Wife's Sister's Marriage Act, 1907, is that the Legislature recognized that the inclusion of such marriages in the prohibited list was not in accordance with the general practice of Christian countries and churches. It therefore took them out of that list, and thus left them in the same position as marriages between persons connected together neither by affinity nor by consanguinity. Such marriages, therefore, ceased to be contrary to God's law, because it is unquestionable that they were so in England solely because they were made so by statute. And when one has arrived at the conclusion

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that to this extent the older enactments are impliedly repealed, the effect of that repeal is as complete and as absolute as though it had been effected by express words. The consequence is that every person within the realm, as well as every Court, is bound thereby.

I have not thought it necessary in considering the effect of the principal enactment to refer to the Canons. The Canons, as such, are not binding on the laity, and were very properly not directly relied upon by the appellant in argument on the point with which I have been dealing, for it must be remembered that so far we have been dealing with the rights of the laity only. If there be anything in the Canons inconsistent with the statute law the Canons are so far invalid and of no force or effect. If I am right in the reasoning which I have given above, the language of the Deceased Wife's Sister's Marriage Act, 1907, is adequate to effect a repeal of every prior statute that would militate against the complete validity of these marriages or would treat them as forbidden or contrary to God's law or incestuous. If this is so, it would apply with equal force to anything in the Canons having the like effect.

It follows, therefore, that, unless the main enactment in the Deceased Wife's Sister's Marriage Act, 1907, is qualified by something which appears in the rest of the Act, the rights of such members of the laity as lawfully contract such marriages are the same as those of any other lawfully married persons. The particular rights which we have here to consider are the rights of the members of the Established Church to receive the Holy Communion in the church of their own parish. That they have an absolute right so to receive it in the absence of lawful cause to the contrary is not denied. It is a right expressly given by statute. By 1 Edw. 6, c. 1, s. 8, which decrees that the sacrament shall thereafter be administered in both kinds, it is provided that "The said minister shall not without a lawful cause deny the same to any person that will devoutly and humbly desire it, any law, statute, ordinance or custom contrary thereunto in any wise notwithstanding," and it was admitted by all parties before us that there is good ground for considering that this statute only declares in this respect the existing law, and that the right

to receive the Holy Communion in the church of the parish existed for centuries before that Act. To ascertain what is meant in this enactment by the words "without lawful cause" we must refer to the rubric prefixed to the Order of Holy Communion in the Prayer Book. Here we find that the minister is directed not to admit certain persons to be partakers of the Holy Communion. It is not necessary to examine all the cases provided for in this rubric, or even to examine at this moment the precise meaning and limitations of the powers given to the minister in regard to them, because taking it at the highest contended for by the appellant it would only (so far as is relevant to the matter before us) permit the minister so to repel from the Lord's Table one who is "an open and notorious evil liver . . . . so that the congregation be thereby offended." In the present case the promoter, Mr. Banister, was a baptized and confirmed member of the Church of England, of established position and character, who had been up to the time of his marriage a regular attendant at Divine service in his parish church and a frequent communicant. No imputation is made by the appellant against the personal character either of the promoter himself or of his wife, the refusal to permit them to partake of the sacrament being solely based on the fact that Mrs. Banister is the sister of the deceased wife of her husband. The alleged justification for repelling is set out in clear and unmistakable language in the responsive plea put in before the Dean of the Arches. This plea states as follows: "The defendant had and has lawful cause for refusing to administer the Holy Communion to the promoters in their parish church. Just cause was as follows: By reason of such affinity, such affinity being notorious, and of their open and notorious cohabitation as husband and wife the promoters were and are open and notorious evil livers so that the congregation were and are thereby offended within the meaning of the rubric prefixed to the Order of Administration of the Lord's Supper or Holy Communion in the Book of Common Prayer." Although the word "incestuous" is not used here, a reference to the earlier part of the plea makes it evident that it alleges that the marriage was "incestuous and forbidden by God's law." It is clear from the preceding part

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of my judgment that so far as the main enactment is concerned this plea is in my opinion unsustainable. The promoters were persons lawfully married, and their cohabitation was the fulfilment of a duty binding upon them by reason of that marriage, and would no more render them evildoers than would the cohabitation of any other lawfully married persons in the parish.

I have treated this case throughout as though the marriage had taken place subsequent to the passing of the Act. As a matter of fact the marriage took place on August 12, 1907, that is to say, sixteen days before the passing of the Act. The promoters did not, however, return to England until after the passing of the Act, and the Act validates all such marriages whether made within or without the realm and whether before or after the date of the passing of the Act, so that the promoters are in the same position at the moment as though the marriage had been subsequent to the passing of the Act, although if the Act had not been passed a question might have arisen as to their domicil at the date of the marriage and as to the validity of the marriage according to the English law by reason of the date when it was solemnized. But the appellant does not rely in any way upon these facts and desires the case to be treated as though the marriage had been an English marriage made since the passing of the Act. Prohibition is moved for in order to settle a great general principle as to the status of such marriages, and it is not desired that it should turn upon any such special facts. I think he has exercised a wise discretion. I do not think he could have succeeded on the special facts of the case otherwise than by establishing his general contention, because the Act operates retrospectively, so that there would be no continuing offence. Moreover, if he could have succeeded at all, it must have been on such special and narrow grounds as would render the decision of no value for the purpose he seeks.

The main contention on behalf of the appellant does not, however, rest on the language of the main enactment, but on that of the first proviso thereto. This reads as follows: "Provided always that no clergyman in holy orders in the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to have

been done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if this Act had not been passed." The appellant contends that this proviso so profoundly modifies the main enactment that the clergy are entitled in the performance of the duties of their office to treat the Act for all purposes as non-existent, and this not only as regards themselves, but as regards all other persons. Counsel on his behalf pushed this contention so far as to invite us to say that the Dean of the Arches ought to have treated the matter before him precisely as though the Act had been thrown out by the Commons on the third reading or had failed to receive the Royal assent.

The argument on behalf of the appellant is then worked out in the following ingenious way. If the Act had not passed the marriage would have been unlawful and void. Persons cohabiting under a void marriage are living in open sin. Living in open sin must be taken to offend the congregation. A clergyman cannot be censured for repelling from the Communion persons living in open sin and thereby offending the congregation, for it is his duty so to do. He could therefore not have been censured for repelling the promoter under present circumstances if the Act had failed to pass, and therefore by virtue of the proviso he cannot now be censured, for it entitles him to have it assumed for all purposes that no such Act exists.

The consequences of adopting this mechanical method of interpretation are certainly startling. To take only one of the numerous suggestions made in the course of argument, this would lead to the conclusion that if a man had married his deceased wife's sister the clergyman might without fear of censure put up the banns of marriage of the woman to another man during the lifetime of the husband, celebrate the marriage, and enter the woman as a spinster in the marriage register. So much for what such an interpretation would entitle a clergyman to do. The consequences are equally startling with regard to what a clergyman would be entitled to say. Preaching is one of the duties of a clergyman, and according to this interpretation he would be free from censure if he told his congregation that marriage with a deceased wife's sister was contrary to the law of

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the land, that the Legislature had always refused to permit it, that cohabitation under such a marriage was incest in the eyes of the law, and that the children of such a marriage were bastards. If the Act had failed to pass all these things would have been true, but the fact that it has passed renders them false. It would require the very clearest language to induce me to interpret any part of an Act of Parliament as conferring any kind of immunity on a clergyman who had thus aided and abetted bigamy or who had thus told a deliberate lie. There are no words in the proviso which compel or, to my mind, give any support to such a contention, and, whatever the proviso may mean, I am satisfied that it does not protect a clergyman in doing anything which the passing of the Act has rendered unlawful or in saying anything that the passing of the Act has rendered untrue. This is in itself sufficient to shew that the method of interpretation urged upon us by counsel for the appellant is not a sound one.

There is nothing illogical or strained in these illustrations. They are the direct and necessary consequences of an interpretation which claims that the Legislature intended that the duties of the clergy to the laity should be regulated on hypothetical assumptions of fact which must necessarily be false and wholly out of accord with the actual facts. But to my mind it is not necessary to go outside this case to find such illustrations. The very contention of the appellant in this case furnishes an example equally in point with those that I have given, though perhaps at first sight less striking. The proviso clearly refers to the clergy alone: it does not modify in any way the effect of the main enactment as far as the laity are concerned. Parties who have contracted such marriages will therefore not be living in sin, but in lawful wedlock. The congregation will not and cannot therefore be offended because that word so used implies that they have reasonable grounds for being offended, whereas no grounds whatever exist. None of the conditions under which the rubric takes effect will therefore be present, and there will be no unfitness, either notorious or otherwise, in the parties "devoutly and humbly desiring" the Holy Sacrament. There is something to my mind revolting to all reverential or religious feeling that in

the case of so sacred a privilege as participation in the Lord's Supper a clergyman should say, or be entitled to say, "I know that you are in fact not living in sin but in lawful wedlock, according to the law of God as declared by the law of the land which is binding on you, and I know, therefore, that in fact the congregation are not and cannot be offended, but I am entitled to hold you to be constructively a notorious evil liver and the congregation to be constructively offended, and I will accordingly drive you from the Lord's Table under colour of applying the rubric." Surely legal subtleties never appeared more odious than in such a connection. The occasion is solemn enough to make it befitting to act according to real facts and not according to legal fictions. I can understand the desire on the part of the clergy to test to the uttermost the question whether these marriages are now lawful in all respects so that they may be regarded as having been removed from the list of prohibited degrees and are in the same position as if they had never been included therein. But if this is decided in the affirmative, I cannot understand, much less sympathize with, any attempt to pervert the plain and simple meaning of the rubric, which in the clearest language prescribes that only actual and notorious personal unfitness takes away the privilege and even the duty of attendance at the Lord's Table.

The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington* (1), *In re Brockelbank* (2), and *Hill* v. *East and West India Dock Co.* (3), have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso. If this rule of construction be borne in mind the true

(1) 6 Q. B. 649. (2) 23 Q. B. D. 461.
(3) 9 App. Cas. 448.

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interpretation and scope of this proviso do not appear to me to present any great difficulty. The matter of the main enactment relates to a certain class of marriages, whether made within the realm or elsewhere. It does away with the ground of objection which up to that date had rendered that class of marriages illegal. One of the duties of clergymen within this realm is to perform the ceremony of marriage, and parishioners have the right to have that ceremony performed in their parish church. Accordingly the effect of the main enactment would have been to make it incumbent upon clergymen to perform certain marriages which previously they could not be called upon to perform, and to do all such acts as have to be done by clergymen in connection therewith, such as the publication of banns, &c. It was well known that many clergymen held strong dogmatic objections to the marriages thus legalized, and the object of the proviso was to respect their scruples in connection with these newly legalized marriages by relieving them from this obligation. There are no words in the proviso which require us to extend its scope beyond this. Indeed the language of the second proviso gives an indication that the performance of the Marriage Service was recognized to be the subject-matter of the first proviso, because it speaks of "such Marriage Service," although the phrase "Marriage Service" had not previously appeared in the Act.

An examination of other legislation relating to similar matters gives strong confirmation to this interpretation. By s. 57 of the Matrimonial Causes Act, 1857, liberty to remarry was given to both parties if the decree of divorce had been made absolute. It was well known that many of the clergy held strong objections to such remarrying, considering it to be contrary to the Scriptures. Out of respect for such scruples the Act contained the following proviso: "Provided always that no clergyman, in holy orders of the United Church of England and Ireland, shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person." There is no doubt that the protection given by this language

was an exceedingly narrow one, because it did not protect the clergyman in refusing to perform acts connected with the marriage, such as publication of banns. But it evidences clearly that the fact of the existence of such scruples on the part of some of the clergy was not sufficient to induce the Legislature to make any change in the duties and obligations of clergymen excepting so far as related to the solemnization of the marriage itself.

The next Act of the kind was the Colonial Marriages (Deceased Wife's Sister) Act, 1906, which legalized such marriages for all purposes in the case of persons domiciled in the parts of the British possessions where the law permitted them. Here the Legislature did not contemplate the marriages taking place within the realm, and there was no question of clergymen within the realm having a duty to solemnize the marriage or do any act in connection therewith. Accordingly we find no proviso for the protection of the clergy.

We now come to the Act of 1907. By that Act the Legislature gave validity to marriages of precisely the same nature as those which it had a year before validated by the Colonial Marriages (Deceased Wife's Sister) Act, 1906. The sole difference was that the marriages dealt with by the 1907 Act would naturally take place in England, and therefore the clergy of the English Church might be called on to solemnize them. Accordingly, following the precedent of the Matrimonial Causes Act, 1857, a proviso was inserted. But by that time the defect in the protection afforded by the proviso in the Matrimonial Causes Act, 1857, was well known, and therefore the language of the proviso was made broader, so that it undoubtedly covers such ancillary acts as the publication of banns, which the former proviso did not do. It would also cover the refusal of the minister to allow his church to be used at a marriage of a parishioner. But there are no words in the proviso which point to its dealing with matters unconnected with the subject of the enactment to which it is a proviso, namely, the marriage itself. Indeed it would be conduct of an incomprehensible character on the part of the Legislature if, after it had passed the Colonial Marriages (Deceased Wife's Sister) Act, 1906 (in which no proviso

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was inserted), it should in respect of exactly similar marriages performed in England insert a proviso affecting the duties of the clergy in matters relating to the rights of the laity other than in connection with the solemnization of the marriage. It cannot be suggested that there is any difference in the nature of the marriages under the two Acts, and to my mind it is absurd to suggest that the Legislature intended that a clergyman should be compelled to treat as valid a marriage with a deceased wife's sister when the parties are domiciled in British possessions, where such marriages are permitted, but should be privileged to treat as void all such marriages if made between persons domiciled in Britain itself, where such marriages are equally permitted.

The same result as is thus reached by an examination of the language of the statute and a comparison between it and analogous legislation comes also from an examination of the rubric itself. The authority to repel is confined to open and notorious misconduct which scandalizes the congregation. It is a grave error to confound this with that unworthiness to take the sacrament which is so impressively referred to in s. 8 of 1 Edw. 6, c. 1, and in the exhortation in the Communion Service. This unworthiness is always treated as a matter between a man and his conscience. So far as this is concerned it is for the man himself, and not for the clergyman, to decide whether he shall take the Communion or not. The authority of the clergyman to repel is derived solely from the rubric, and its language shews that it is based on the offence which open and notorious sin gives to the congregation. On account of this offence the minister may refuse the sacrament to the evil liver. But this is not as a punishment, but as an interim step pending the decision of the case by a competent Court. The relevant part of the rubric reads as follows: "And if any of those be an open and notorious evil liver . . . . so that the congregation be thereby offended; the curate, having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's Table, until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied which before were offended. . . . . Provided that every minister so repelling any . . . . shall

be obliged to give an account of the same to the Ordinary within fourteen days after at the farthest. And the Ordinary shall proceed against the offending person according to the Canon." The directions that the minister must report to the Ordinary and that the Ordinary shall take proceedings shew that the rubric never left the laity at the mercy of the clergy with regard to the right to partake of the sacrament. They could only be deprived of that right by the decree of a competent Court. The only power the minister had was to refuse them the sacrament during the necessary period for the Ordinary to obtain such decree. But counsel for the appellant frankly admitted that since the Act of 1907 no such proceedings were possible, and therefore no decree could be obtained against persons who had married under that Act. This is, indeed, too clear for argument. It follows, therefore, that the interim suspension pending such decree is no longer possible. The whole reason for it has gone. It is idle to pretend that a perpetual exclusion at the will of the minister without appeal represents that which the rubric provides. Yet this is in substance what the appellant claims to do. To my mind the fact that no Court could pronounce the promoter to be a notorious evil liver after the passing of the Act of 1907 takes away the power of any minister to refuse him the sacrament. It was only as ancillary to the obtaining of such a decree that the minister had the power of even temporary suspension.

An earnest appeal was made to the Court by counsel on behalf of the appellant based on the supposed hardship to those clergymen who conscientiously object to these marriages if the more limited interpretation of the proviso be adopted. I fail to appreciate the force of this appeal. No man has a right to become a clergyman of the Church of England who is not prepared to perform the lawful duties of that office. For instance, one of such duties is the solemnization of marriage of parishioners unless there be lawful cause for refusing. That one of the parties has been divorced and seeks to marry again during the lifetime of the former spouse is unquestionably not such lawful cause in the case of the innocent party, because such remarriage is expressly permitted by the statute, and the clergyman is

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compellable to solemnize such a marriage of a parishioner if called upon so to do. If, then, a person conscientiously holds that marriages cannot be dissolved, or that if dissolved neither of the parties may marry again in the lifetime of the other (an opinion held by many members of the Church of England), and if the solemnization of such a marriage would do violence to his conscience, he should abstain from entering holy orders, for if he do so he certainly comes under the legal obligation to solemnize them. Similarly, if he considers that a man who marries his deceased wife's sister is living in a state of sin and should on that account be refused the Communion, he ought to remember that in taking holy orders he becomes a minister of a Church which is unquestionably bound by law to treat such marriages as lawful for all purposes if made under the Colonial Marriages (Deceased Wife's Sister) Act of 1906, so that, as admitted by counsel for the appellant, persons so married cannot be refused the Communion. This being so, I cannot say that I feel much sympathy with a delicacy of conscience so eclectic that it is willing to bear the strain of treating persons so married as reputable members of the Church of England in a case where the marriage is between inhabitants of a colony, but finds unbearable the burden of treating them as such when the marriage is between inhabitants of this country, where it is equally in accordance with the law. I have much more sympathy with the argument that we ought to find clear legislative direction before we pronounce that a parishioner has lost all rights both under statute and common law to partake of the Holy Communion in his parish church by reason of his having contracted lawful wedlock with a person not within the prohibited degrees as they now stand. The privilege of partaking of Holy Communion in their church is in the eyes of many the highest privilege of a member of the Church of England, and it is not in accordance with the practice of our Legislature that the rights of the laity in matters of such importance should be made dependent on the views of a particular clergyman, or even of the Church itself, except so far as those views are by law made binding on the laity. The interpretation pressed upon us on behalf of the appellant amounts to saying that the prohibited

degrees remain unchanged, and therefore a clergyman is not only permitted but bound to treat a person in the position of the promoter as a notorious evil liver, and to refuse to him the Communion in his parish church, and as he has no legal right to be admitted to Communion elsewhere, this would amount to practical excommunication. It is strange indeed that it should be urged upon a Court that it is its duty to adopt, if possible, such interpretation as will thus deprive the unoffending laity of its rights and privileges.

For these reasons I am of opinion that the Dean of the Arches Court of Canterbury rightly interpreted the Act of 1907 in the case before him, and that the decision of the Court of King's Bench in refusing to make absolute the rule for a prohibition was right and should be affirmed, and that this appeal should be dismissed with costs.

FARWELL L.J. This case is an appeal from the refusal of the Divisional Court to prohibit the Dean of the Arches from admonishing the vicar of the parish of Eaton (whom I will hereafter, following the rubric, call the curate) for repelling from Holy Communion the respondents, who are members of the Church of England, duly confirmed and resident in his parish, and it raises the question of the right of the laity to receive Holy Communion, a question of the most vital importance to all faithful sons of the Church, who regard it "as a proper and efficacious instrument to raise in us pious affections towards our good God and gracious Redeemer; and to dispose us to all holy practice; to confirm our faith, to nourish our hope; to quicken our resolutions of walking carefully in the way of duty; to unite us more fastly to our Saviour, and to combine us in charity one towards another." I quote Dr. Barrow on the Sacraments, edition 1697, pp. 452-3, and I lay stress on this because the case has been argued as if it were a mere question of offence to the conscience of the curate and not of tremendous import to the intending communicants.

The question turns on the construction of the Acts 25 Hen. 8, c. 22, 28 Hen. 8, c. 7, 32 Hen. 8, c. 38, 1 Edw. 6, c. 1, and 7 Edw. 7, c. 47. The Acts of Henry VIII. recite that a marriage between a

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man and (amongst others) his deceased wife's sister is "prohibited by God's law," and enact that no subject of the realm within that degree shall thenceforth marry. The mere statement in an Act of Parliament that any specified thing is contrary to the law of God does not make it so in fact; for the law of God is immutable and is no more known to one Parliament than to another, but the wisdom of one Parliament may seem folly to the next, and the declarations of the former may be set aside by the latter; and yet the law of God remains unchanged and unchangeable. No one acquainted with the history of Tudor times can doubt that if it had suited the King's purpose to declare that marriage with a deceased wife's sister was not contrary to the law of God his Parliament would so have declared it. The true and only effect of such a declaration is that stated by the judges in *Hill* v. *Good* (1) and cited with approval by the Lord Chancellor in *Brook* v. *Brook* (2), namely, "When an Act of Parliament declares a marriage to be against God's law, it must be admitted in all Courts and proceedings of the kingdom to be so"; and this question, being one solely of the construction of the Act, is for the Courts of Law, and not for the Ecclesiastical Courts or for the Church. It is not a question of what is contrary to God's law and what is not, but of what has the Act declared to be so. This is not only the view of our Law Courts, but is recognized by jurists, such as Grotius "De imperio summarum Potestatum circa sacra," and by Fathers of our Church, such as Chillingworth, who in his "Religion of Protestants," &c., treats the right of individual judgment as the foundation of the Protestant religion; when he found "Fathers set against Fathers and councils against councils" he concluded that the Bible is exclusively the religion of Protestants, and each man's own reason is the interpretation of the Bible, and this is in accordance with article XX. of the Articles of Religion. It is obvious that this right of individual judgment which created the Reformation necessitates some ultimate arbiter, for the opinions of men, even taking only those competent to form an opinion, will differ, and the State is the only possible arbiter, since (as Jeremy Taylor in the "Liberty of Prophecying" says) "no Churches

(1) Vaugh. 302. (2) 9 H. L. 193, at p. 211.

believe themselves infallible, that only excepted, which all other Churches say is most of all deceived, it were strange if in so many articles which make up their several bodies of confession, they had not mistaken every one of them in something or other," and the only limit placed by Jeremy Taylor on the power of the State is to exclude it from legalizing anything contrary to good life or destructive to human society and the public and just interests of bodies politic, and from teaching an ill life. But the State can provide that for all purposes in all its Courts, both civil and ecclesiastical, any given act shall be lawful and the Courts must then so treat it, whatever the opinions of the individual members of the Court might be concerning it.

Now, the Acts of Henry VIII. having declared marriages with a deceased wife's sister to be contrary to God's laws, and having forbidden them on that ground, the statute 7 Edw. 7, c. 47, enacts that no such marriage shall be deemed to have been or to be void or voidable as a civil contract by reason only of such affinity; and although it relieves the clergy from the legal necessity of assisting at such marriages, it authorizes their solemnization in church by clergy of the Church, and permits the clergy themselves to contract such marriages so far as the law is concerned. In my opinion the effect of this Act is to repeal both the declaration and the enactment on this matter in the Acts of Henry VIII. It is to my mind so repulsive as to be inconceivable that the King, by and with the advice of the Lords spiritual and temporal, and Commons, should have continued the declaration that such marriages are contrary to God's law as incestuous, and yet should have legalized them as regards clergy and laity alike and authorized their solemnization in church to the desecration of the House of God. It must be remembered that there never has been a consensus of opinion in Christendom as to the incestuous nature of these marriages; it is not a case of legalizing an Act in flagrant defiance of the united opinion of all godly men, or exceeding the limits suggested by Jeremy Taylor, but it is the recognition by Parliament of the changes in opinion as to an act the innocence or guilt of which in itself was always open to question. Sect. 3 is in favour of this view, for if the marriage remained incestuous this section would have been unnecessary.

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It was then argued that the words "as a civil contract" shew that the marriage was not legalized for all purposes. I confess that I am unable to appreciate the possibility of any duality in marriage. Lord Stowell (*Turner* v. *Meyers* (1)) calls it a civil contract as well as a religious one, that is to say that the marriage contract between the parties is coupled with and sanctified by their vows to God, but there is but one marriage, and every marriage is a contract. That contract may be blessed by the Church, in which case the parties are joined together in holy matrimony, or it may be attested and allowed by a registrar or secular official; but it is a contract neither more nor less, although the law requires publicity in its acknowledgment in church or register or the like. The very words of our Marriage Service shew this: the spouses openly declare in answer to the minister their consent to take one another as husband and wife, and the statement follows, "Forasmuch as M. and N. have consented together in holy wedlock." If it is necessary to find some reason for the insertion of the words "as a civil contract," I should say that they led up to and explained the proviso following by shewing that although the contract of marriage was valid it was intended to relieve the clergy from the duty of performing or aiding it. The difficulties in the way of a contrary construction are overwhelming. Suppose the spouses find a clergyman willing to perform the marriage ceremony in church as the Act allows, the marriage is in this case legalized as a contract and blessed by the Church. How does it differ from any other marriage so that it can be said to be void in an Ecclesiastical Court? And yet as a contract it has no more or less validity than a marriage before the registrar.

Then it is argued that s. 4 shews that the marriage is regarded as still incestuous if contracted by a clergyman, and that this shews that the declaration in the Acts of Henry VIII. remains. I do not agree. This section appears to me to be based on St. Paul's advice to the Corinthians as to eating of meats offered to idols: it is lawful but not convenient because of the possibility of its being a stumbling block to weaker brethren. It is of course well known that a large number of people think these marriages

(1) 1 Hagg. Cons. 414, at p. 417.

wicked, and it is out of consideration for them that it is suggested that a clergyman who avails himself of his indubitable right under the Act so to marry may be open to ecclesiastical censure, not for incest, but for having given cause of offence to his brethren and possibly to his own congregation. I am therefore of opinion that the declaration and enactment above mentioned in the Acts of Henry VIII. have been absolutely repealed, and that marriages with a deceased wife's sister are now legal and valid for all purposes.

The next point raises different questions. The curate justifies his repulsion of the respondents on the ground of the proviso in s. 1 and on the contention that the rubric to the Communion Service justified his repulsion. As to the first I am of opinion that the proviso is confined, according to the ordinary rules of construction, to the substantive enactment of which it is a qualification; the enactment gives validity to these marriages, but relieves clergymen from liability for refusing to officiate at or aid in any way the performance of such marriages. This construction is aided by the proviso on the proviso immediately following. The general result is that the clergyman need not do anything to aid such a marriage, although he may do so if he pleases, and he may also permit his church to be used for the Marriage Service if another clergyman, duly qualified, is found willing to officiate. The words of the proviso differ from those in 20 & 21 Vict. c. 57, because it has been found that the latter Act did not relieve the clergyman of his duty in respect of the publication of banns. A construction which leaves the proviso unrestricted leads to the difficulties pointed out by the Dean of the Arches in his judgment at p. 393, and to further insuperable difficulties when the Act of 1 Edw. 6, c. 1, s. 8, and the rubric are considered.

It was suggested by Mr. Rowlatt that any objection to the construction put by the Dean of the Arches on the rubric was not matter for prohibition, but for appeal to the Privy Council. It is plain, however, that in many cases the Courts of Law must adjudicate on ecclesiastical law, which is not a foreign law to be ascertained by evidence, but part of the common law: see Lord Blackburn's speech in *Mackonochie* v. *Lord Penzance*. (1) It is,

(1) 6 App. Cas. 424, at p. 446.

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however, by no means easy to draw the line between the cases which ought and those which ought not to be dealt with on prohibition, but we are, in my opinion, relieved from the necessity of deciding, because the Attorney-General did not take the point in the Divisional Court, and the case was dealt with by them without objection, and it would be difficult to consider the application of the Act of 1 Edward VI. and 7 Edward VII. to the present case without considering the rubric also.

The Act 1 Edward VI., after referring to the propriety of ministering the sacrament in both kinds (as is also provided by article XXX. of the Articles of Religion), enacts this: "And also that the priest which shall minister the same, shall, at the least one day before, exhort all persons which shall be present likewise to resort and prepare themselves to receive the same, and when the day prefixed cometh, after a godly exhortation by the minister made, wherein shall be further expressed the benefit and comfort promised to them which worthily receive the said Holy Sacrament, and the danger and indignation of God threatened to them which shall presume to receive the same unworthily, to the end that every man may try and examine his own conscience before he shall receive the same." It will be observed that the exhortation in the Communion Service is founded on this, and that the rubric is intended to express what is "lawful cause" within s. 8. I so entirely concur in the views expressed by the Dean of the Arches (pp. 385 to 387) on the construction of the rubric that I might almost leave the matter there. But the question is one of such importance to all true members of the Church of England, and the arguments of the appellant have so entirely ignored the rights of the laity, that I feel bound to express my own opinion.

The Church is not the Church of the clergy or of the laity, but of both. "The Church of England," says Lord Selborne ("Defence of the Church of England" (1886)) "consists, strictly speaking, of the lay as well as the clerical members of the community," and article XIX. declares that "The visible Church of Christ is a congregation of faithful men, in the which the pure Word of God is preached, and the sacraments be duly ministered according to Christ's ordinance in all those things that of necessity are requisite to the same." There are but two sacraments,

Baptism and the Lord's Supper, both of paramount importance. The right of all members of the Church to receive the Lord's Supper is recognized in articles XXVIII. and XXX., the latter of which concludes that "both the parts of the Lord's sacrament, by Christ's ordinance and commandment, ought to be ministered to all Christian men alike." And article XXIX. recognizes that amongst the partakers may be found "the wicked and such as be void of a lively faith," and these are warned that they are not true partakers of Christ, but eat and drink the sacrament to their own condemnation.

It is both the duty and the privilege of the priest to administer the sacrament; it can never be his privilege, although it may in some cases be his duty, to refuse to administer it, for privilege is that which he claims as due to himself; duty is that which he owes to others. It is clear that he cannot refuse the sacrament to any one merely on the ground of his own knowledge of such person's sin, and of the shock to his own conscience in administering it to such an one. The exhortation with which the Communion Service commences states: "Therefore if any of you be a blasphemer of God, an hinderer or slanderer of His Word, an adulterer, or be in malice, or envy, or in any other grievous crime, *repent you of your sins*, or else come not to that Holy Table." There then follows a general confession, in which the congregation bewail their manifold sins and wickedness. The sacrament is not forbidden to sinners, however great, as is apparent from the exhortation which I have just read. If it was open only to those who are without sin, who dare attend? But sinners are bidden to repent, and this is a matter for their own conscience only, although they may seek comfort or counsel from a minister of God as stated at the end of the exhortation. But the sin, however great, does not authorize the minister to reject the sinner; he may rebuke or warn, but it is not for him, on the ground of his own feeling of horror for the sin, to drive the sinner from his Master's Table. Indeed, if he learns of the sin by the confession suggested in the exhortation, he is bound by Canon 113 not at any time to reveal or make known "to any person whatever any crime or offence so committed to his trust and secrecy." Now, when one turns to the rubric with these considerations present

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to one's mind, the construction is clear. In addition to the curate and the sinner, there may be other persons concerned to whom the curate owes a duty. As it is his duty to administer the sacrament to all Christian people, so it is also his duty to repel any open and notorious evil liver whose presence at the Holy Table may be a stumbling block and rock of offence to other communicants; and so the rubric provides that "if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, *so that the congregation be thereby offended*," the curate is required to call upon him to repent and amend his former naughty life "*that the congregation may thereby be satisfied, which were before offended*, or else to refrain from presenting himself."

It is said that the Canons, and especially Canons 26 and 109, go further than this; but the Canons do not bind the laity, while the rubric has parliamentary sanction and binds both clergy and laity, and if there is any difference between them the rubric must prevail, and on the construction of the latter it is clear that it is not the sin, but the open and notorious nature of the sin and the scandal caused thereby to the congregation that require the curate to repel. I pass by the point that the curate's power is interim only, as not really raised in this case. The appellant makes no point of the fact that the marriage took place in Canada a few days before the Act 7 Edward VII. came into operation, nor are these days material, because the respondents did not return to England or reside in the parish until some time after the commencement of the Act. Both parties desire to treat the case as if the marriage had taken place in England after the Act. The Court is bound to assume that the curate conscientiously believes that such a marriage would be sinful, and would accordingly refuse to marry them, as he is entitled to do under the Act. The Court is also bound to assume that the spouses conscientiously believe that this marriage is not sinful, as it is certainly not unlawful. The curate's conscientious scruples can neither make the spouses when married evil livers nor justify the congregation in being offended at their marriage. The proviso on the most favourable construction for the appellant can only authorize the curate to act according to his conscience,

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but he cannot repel unless the congregation be offended by the notorious evil life of the sinner: the Act does not call into existence facts contrary to the truth in order to enable the curate to repel. It is impossible to say that persons who marry according to the law of England and who may also have that marriage solemnized in church can be treated as notorious evil livers because they have so acted, and it is equally impossible to say that a congregation has any ground for offence against them for so acting. The fact that the Legislature has been tender of the curate's conscience in one respect does not enable us to stretch the proviso so as to allow the same privilege to the congregation. If this were not so, it would be another reason for restricting the generality of the words of the proviso so as not to allow rights given by 1 Edward VI. to be taken away without any direct or necessary reference thereto in the Act said to have that effect.

As the spouses are bound in charity to admit that the curate honestly and conscientiously believes the marriage to be sinful, so the curate is bound to admit that the spouses honestly and conscientiously believe the marriage to be innocent; if he refuses to do so, where is his Christian charity? If he does so, what justification has he for stigmatizing them as open and notorious evil livers? And if this is so, it is impossible that the mere belief of the curate can entitle him to deprive the spouses of their legal right to the sacrament.

Further, the refusal of the sacrament is one of the incidents of excommunication and is "pro correctione morum et pro salute animæ." Its object is to secure repentance and amendment of life. But amendment is not only impossible, but unlawful, for it is the duty of husband and wife to live together maritally, a duty which is enforceable by an order for restitution of conjugal rights. And how can the so-called sinners be called to repent of a sin which is in their belief as well as according to law no sin, but a lawful act? Again, when there has been an actual marriage, the curate has no authority to declare or treat it as void, as is pointed out by the Dean of the Arches at p. 381, on the authority of the canon law, but he must present the offenders to a Court of competent jurisdiction before he can treat it as a nullity. But since the Act there is no power in any Court to

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declare such a marriage void, and no possible reading of the proviso can confer such a power. I am therefore of opinion that this appeal must be dismissed with costs.

Appeal dismissed: Rule discharged.

Solicitor for the Dean of the Arches: *Solicitor to the Treasury.*

Solicitors for Mr. and Mrs. Banister: *Collyer-Bristow & Co., for Mills & Reeve, Norwich.*

Solicitors for Canon Thompson: *Brooks, Jenkins & Co.*

H. B. H.

1910 *Jan.* 14, 15.

K. *v.* K. (OTHERWISE R.).

Nullity—Insanity—Decree Nisi—Application on behalf of Respondent for an Allowance—Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1.

An application on behalf of a respondent for an allowance to be made by the petitioner is not confined or limited to the time when the decree nisi is pronounced, but may be made then or at any time up to and including the date when the decree is made absolute; and such allowance, if ordered for a monthly or weekly sum, under s. 1, sub-s. 2, of the Matrimonial Causes Act, 1907, may not only be discharged, modified, suspended, or revived under the proviso (*a*) of that sub-section, but is also liable to be increased under proviso (*b*) of the same sub-section.

It is open to the Court, by consent, to make an order at the time of the decree nisi, and to embody it therein, dealing with the whole question of settlement and allowance.

HUSBAND'S petition for nullity on the ground that at the date of the ceremony of marriage the wife was and prior thereto had been of unsound mind and incapable of contracting marriage.

The respondent, who appeared by her guardian ad litem, by her answer denied that at the time when she went through the ceremony of marriage with the petitioner she was of unsound mind.

It was common ground that the respondent had been of unsound mind ever since the second day after the wedding, but the case put forward on her behalf rested to a great extent on the

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fact of non-consummation, which was admitted by the petitioner, and that this had contributed to, if it had not actually caused, the renewal, in an aggravated and apparently permanent form, of the mental trouble from which she had suffered and for which she had been treated some months before the marriage.

The case was heard in camera.

The Court (Bargrave Deane J.) pronounced a decree nisi, and made an order that the respondent should have her costs.

H. Durley Grazebrook, for the respondent, asked for an allowance. The application, being by a respondent, must be made now; otherwise it could not be made at all. If an order is made now, there may be power to modify it hereafter, if circumstances change, under the Matrimonial Causes Act, 1907.

Bayford, for the petitioner. There is nothing in the Act of 1907 to limit it to applications by a petitioner, whether wife or husband. The petitioner is quite willing to make the respondent an allowance, and the only question is as to the amount and the mode of carrying it into effect. It is suggested that this question should be referred to the registrar.

H. Durley Grazebrook, in reply. There has only been one case, so far as is known, since the Act was passed, where, upon a decree in a nullity suit, an allowance was asked for on behalf of the respondent. The case was not reported, probably because the petitioner (husband) had no means except a voluntary allowance, and upon the facts no order was made. But in that case it was suggested on behalf of the petitioner that the respondent could apply later, and the learned judge (Sir Gorell Barnes, President) expressed the opinion that the application must be made then, at the time of the decree nisi, or not at all, though his Lordship added that he did not say that finally, as, upon the facts and figures before him, no allowance ought to be ordered. That was, like this, a suit by the husband, though the decree of nullity was based on a different ground, namely, the prohibited degrees of relationship. If, however, the Court now holds that the Act of 1907 applies to all cases, the guardian ad litem asks the Court to deal with the whole matter and so save further trouble and expense.

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BARGRAVE DEANE J. I have no doubt, reading the words of s. 1 of the Act of 1907, that the present application on behalf of the respondent for an allowance to be made towards her support is not limited to the date of the decree nisi (to-day), but could be made quite safely and properly hereafter. As I read the section, sub-s. 1 deals with the question of an allowance settled and secured. Once it has been secured, the deed securing it cannot be altered. But sub-s. 2 deals with a monthly or weekly payment; and then follow the provisoes in paragraphs (*a*) and (*b*), the former of these following the wording of the old Act, and these paragraphs enable the Court to increase or diminish or suspend or revive any order for such payment, according as circumstances change and means allow. Being called on to decide this matter now, I must say that the words of the Act of 1907 are, in my opinion, clear. If both parties wish, I will deal with the whole matter now. If not, then the matter must go to the registrar to inquire and report.

[After further discussion an order was made by the learned judge by consent to the following effect:—] By consent I now order that, the settlement having come to an end by reason of the decree, the funds which were the subject of that settlement be placed in the hands of fresh trustees, one to be nominated by the respondent's guardian ad litem and the other to be nominated by the petitioner, and that the income of those funds be applied for the benefit of the respondent, and that a sum of 75*l.* a year, payable monthly, be paid by the petitioner towards the respondent's expenses at the asylum (named) so long as she remains there.

If she is removed elsewhere, or if circumstances change materially, you can come before me again, and, as the present order is made by consent, I will insert the words "liberty to apply," so that it may be quite clear that I intend the provisoes of sub-s. 2 of s. 1 of the Act of 1907 to apply.

Solicitors for petitioner: *Budd, Brodie & Hart.*
Solicitors for respondent: *Farrer & Co.*

H. D. G.

SACKVILLE-WEST *v.* THE ATTORNEY-GENERAL (Lord Sackville and Others cited).

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Oct. 25, 28.

Legitimacy Declaration Act, 1858 (21 & 22 *Vict. c.* 93), *ss.* 4, 11—*Petition—Mode of Trial—Right to Trial by Jury—Discretion of Court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 36—*Jury refused.*

The judge has absolute discretion as to the mode of trial of the issues arising on a petition for a declaration of legitimacy under the Legitimacy Declaration Act, 1858, and, in exercising such discretion, the judge will have regard to the balance of convenience. Where the issues for trial involved, besides possible questions of character affecting one of the parties, the reading of a mass of evidence, taken on various commissions, the minute and careful examination of numerous documents, and probably questions of admissibility of evidence, which might prejudice the minds of a jury:—

Held, that the difficulty of deciding fairly any question of character or credit that might arise could not outweigh the inconvenience, delay, and possible miscarriage of justice which the trial of such complicated matters before a jury was likely to involve, and that an application by the petitioner for trial by jury should be refused.

This was a summons adjourned into Court for argument and decision.

The petitioner, Ernest Henri Jean Baptiste Sackville-West, had presented a petition under the Legitimacy Declaration Act, 1858, asking for a declaration of his legitimacy.

By this summons the petitioner sought an order for the trial by a jury of the issues of fact arising on the petition.

Harold Morris, for the petitioner. The applicant has a right to a jury. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 27, 28, 36, created in this Court for the first time the jurisdiction to try questions of divorce. By s. 28 of that Act either of the parties to a divorce petition may insist on having the contested matters of fact tried by a jury, as thereinafter mentioned. Under that Act the jurisdiction of the old Ecclesiastical Courts was transferred to this Division; and by s. 36 it was provided that, "in questions of fact arising in proceedings under this Act, it shall be lawful for, but, except as hereinbefore provided" (that is, by s. 28), "it shall be lawful for, but not obligatory upon, the

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Court to direct the truth thereof to be determined before itself or before any one or more of the judges of the said Court, by the verdict of a special or common jury."

At that time the Legitimacy Declaration Act was not in contemplation. Then when this Act was passed this Court was given jurisdiction to entertain petitions thereunder, and by s. 4 all the provisions of the Divorce Act, 1857, were made to apply, so far as practicable, to proceedings under the Legitimacy Declaration Act, and by s. 11 the two Acts were to be construed together as one Act. An entirely new jurisdiction was created in regard to divorce and in regard to petitions for declaration of legitimacy, and s. 28, not s. 36, is the section which applies to those two classes of cases. But, even if s. 36 were applicable, the discretion ought to be exercised in favour of a petitioner who asks for trial by jury.

In *Löwenfeld* v. *Löwenfeld* (1) the Court of Appeal decided that, in spite of r. 61 of the Divorce Rules, the Court had a discretion whether an act on petition should or should not be tried with a jury ; but in *Bouverie* v. *Attorney-General* (2) Sir Cresswell Cresswell, in a considered judgment, decided that, in the absence of special reasons to the contrary, an application for trial by jury made by a party in a suit for declaration of legitimacy should be granted.

Serious imputations have been made against the present petitioner in the course of the taking of evidence which will be adduced in the present proceedings, and he ought to be allowed to lay his case before a jury.

Eldon Bankes, *K.C.*, and *Ralph Bankes*, for Lord Sackville and other parties cited, opposed the application, and, in addition to the foregoing authorities, they referred to *Ricketts* v. *Ricketts* (3), where, upon a petition for nullity on the ground of impotence, the judge ordinary, Sir J. P. Wilde, refused a jury, holding that the issue was more fit for a judge alone, and that, except in suits for dissolution, the Court had a discretion to refuse or allow a jury.

Pilcher, for the Attorney-General, the respondent, submitted

(1) [1903] P. 177. (2) (1862) 2 Sw. & Tr. 548.
(3) (1866) 35 L. J. (P. & M.) 92.

to the judgment of the Court, but, in answer to a question by the President, stated that he considered trial by the Court itself without a jury the more convenient mode in the present case.

[THE PRESIDENT. I think that the operation of s. 28 of the Act of 1857 is limited to issues as to adultery, and does not extend to those of the class arising here.]

In the course of the arguments various topics as to the evidence and probable course of the trial were dealt with, all of which, so far as material, are referred to in the judgment.

Cur. adv. vult.

1909. Oct. 28. BIGHAM, P. This is an application by the petitioner for an order for the trial of this case by a jury instead of the Court alone. The application is made under s. 36 of the Matrimonial Causes Act of 1857, the provisions of which are made to extend to proceedings under the Legitimacy Declaration Act, 1858, by s. 4 of the latter Act.

The suit is brought under the Act of 1858. Sect. 36 of the Act of 1857 is as follows: "In questions of fact arising in proceedings under this Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the Court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said Court, by the verdict of a special or common jury"; and s. 4 of the Act of 1858 is as follows: "All the provisions of the Act of the last session, chapter eighty-five, so far as the same may be applicable, and the powers and provisions therein contained in relation to the making and laying before Parliament of rules and regulations concerning the practice and procedure under that Act, and fixing the fees payable upon proceedings before the Court, shall extend to applications and proceedings in the said Court under this Act, as if the same had been authorized by the said Act of the last session."

It was suggested during the argument that the petitioner was entitled to a jury as of right, because of the provisions of s. 28 of the Act of 1857; but I expressed an opinion that the operation of that section is confined to issues relating to allegations of

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adultery in divorce proceedings, and has no application to proceedings under the Legitimacy Declaration Act, 1858, and to that opinion I adhere.

The question, therefore, resolves itself into this, whether I should, in the exercise of my discretion under s. 36, direct a trial by jury, or whether I should leave the issue to be dealt with by the Court alone. Some authorities were referred to by counsel for the petitioner and were relied on by him as supporting his client's application for a jury; and the same authorities were relied upon by counsel for the parties cited in opposition to the application. I find nothing in those authorities to control the discretion which I am satisfied the section intends that I should have and exercise. If the questions to be decided at the trial were simple questions of fact I should probably accede to the petitioner's application for a jury. But they are by no means simple. Counsel for the parties cited pointed out that a very large body of evidence, about 2000 folios, has already been taken at different places abroad on commission and will have to be read at the trial. Questions of the admissibility of parts of this evidence will have to be discussed and decided. I was also informed that about 150 documents, including photographs, have been exhibited to the depositions; and some of them, I am told, will require minute and careful examination. I do not think all this can be conveniently done before a jury. I know the difficulty of keeping the attention of twelve men upon evidence, which may occupy days in reading, and I know the inconvenience and the prejudice which may be caused by discussing before such a tribunal questions as to the admissibility of evidence. It is said by the petitioner's counsel that questions affecting the character of the petitioner have been raised during these proceedings and are likely to be raised again at the trial, and that such questions ought to be submitted to a jury if the petitioner so desires. Whether such questions are to be raised or not I cannot say, but even if they are, I cannot imagine that the difficulty of determining them fairly without a jury will be very great, and I am satisfied that such a difficulty cannot outweigh the inconvenience, the delay, and the possible miscarriage of justice which the trial of this complicated case before a jury

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would be likely to involve. I am told that the Attorney-General, who is a necessary party to the proceedings, but quite an impartial one, takes the same view of the matter that I do and desires to have the case tried by the Court alone. I therefore refuse this application, but, as I am asked, I give leave to appeal.

I think that the costs should be costs in the cause, but, in the event of an appeal, I leave it to the Court of Appeal to decide the matter of costs.

NOTE.—No appeal appears to have been prosecuted. The petition was dismissed on February 14, 1910.

Solicitors for petitioner: *Nussey & Fellowes.*

Solicitors for Attorney-General (respondent): *The Treasury Solicitor.*

Solicitors for parties cited: *Meynell & Pemberton.*

H. D. G.

IN THE ESTATE OF THOMAS VINES. VINES *v.* VINES AND ANOTHER.

1910

Jan. 27, 31.

Will—Not conditional — Dispositions not dependent on a Specific Event— Document pronounced for.

Where a will is made in terms subject to the happening of a certain event, that event must occur to render the will operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, it becomes operative whether the event happen or not.

For instance, if a man write in his will "If I die to-morrow my will is" so and so, his death must occur on the morrow to make the will operative; but if the words be "Lest I die to-morrow" . . . . the document will be operative whether he die or not on the morrow.

The question whether a testamentary document is conditional or not depends on the wording of the document itself, and, if it can be said that the language used therein is ambiguous, extrinsic evidence is admissible to assist the Court in clearing up the ambiguity.

The Court admitted evidence of declarations by the testator, made down to within a short time before he died, to the effect that the will in question was all right, and that his wife would take all he had to leave.

PROBATE SUIT.

The plaintiff, Lucy Vines, as widow and universal legatee,

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propounded the holograph will of her late husband, Thomas Vines, made by him while he was employed in India in the year 1872. The document was as follows:

"The Great Indian Peninsular Railway Company,
Company's Offices, Bombay,
"June 25th, 1872.

"My Will

"If any thing should happen me while in India that all moneys documents property or securitys blong to me or any money or monies due to me or owing to me at the time of my death to be handed over to my wife Lucy Vines and I appoint that J. Holden to act and collect all monies due to me and the same to be as aforsaid to be paid to my wife I allso appoint David Polson to see that this my will to be executed by the aforsaid J. Holden all property belong to me at the time of my death to be desposed of to the best addvantage after paying all my expences the remainder to be paid to my wife

"Witness my hand
"Thomas Vines.

"Witnesses
"D. Polson,
"G. Alcock."

The defendants, two of the deceased's next of kin, resisted the plaintiff's claim, and alleged that the will was conditional only and that the condition was not fulfilled. Due execution was, pursuant to leave, proved by an affidavit of the surviving attesting witness in India, exhibiting a photograph of the will. The plaintiff gave evidence of certain declarations of adherence by the testator.

H. Durley Grazebrook, for the plaintiff, relied on *In the Goods of Mayd* (1) and *In the Goods of Stuart* (2), and referred to the cases therein cited, namely, *In the Goods of Dobson* (3) and *In the Goods of Porter.* (4)

J. Harvey Murphy, for the defendants, cited *Parsons* v.

(1) (1880) 6 P. D. 17.
(2) (1888) 21 L. R. Ir. 105.
(3) (1866) L. R. 1 P. & M. 88.
(4) (1869) L. R. 2 P. & M. 22.

Lanoe (1), *Roberts* v. *Roberts* (2), *In the Goods of Robinson* (3), *In the Goods of Dobson* (4), and *In the Goods of Hugo.* (5)

The evidence of the widow is inadmissible: *In the Estate of Bryan.* (6)

Cur. adv. vult.

1910. Jan. 31. BIGHAM, P. In this case the plaintiff, who is the widow of Thomas Vines, claims to have an alleged will of the deceased established, and as universal legatee thereunder to have a grant of administration with the will annexed.

The defendants, as next of kin, resist the claim upon the ground that the will is conditional and that the condition has not happened.

The plaintiff and the deceased were married in the year 1861. Some time afterwards the deceased went to India in the service of a railway company. While there he made the will which the plaintiff now sets up and sent it home to his wife. This was in 1872. He subsequently left India and returned to England in or before 1876, and was then asked by the plaintiff if he was going to alter his will, to which he answered "No; it is all yours, and you are my all." He repeated this remark about a fortnight before his death, which occurred on October 31, 1908. The will is in the following terms:—[The learned President read the will.]

The defendants contend that this will is conditional because of the words "If any thing should happen me while in India." These words are said to be equivalent to "If I should die while in India," and it is argued that, as he did not die in India, the condition has not happened and the will is nugatory.

My attention has been drawn to a number of authorities upon the question as to when words in a will, such as the words in this case, make the document conditional and when not; but it is not necessary for me to examine those authorities at length, for they were all carefully reviewed by Sir Francis Jeune in the case of *In the Goods of Spratt.* (7) It is, perhaps, sufficient to say that the rule appears to be that where a will is

(1) (1748) 1 Ves. Sen. 189.
(2) (1862) 2 Sw. & Tr. 337.
(3) (1870) L. R. 2 P. & M. 171.
(4) L. R. 1 P. & M. 88.
(5) (1877) 2 P. D. 73.
(6) [1907] P. 125.
(7) [1897] P. 28.

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The President.

made in terms subject to the happening of an event, that event must occur before it can become operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, the will becomes operative whether the event happen or not. To give an illustration: If a man write "should I die to-morrow, my will is" so and so, his death must occur to make the document operative; whereas if he write "lest I die to-morrow," it will be operative whether he die or not on the morrow.

But the question always depends on the wording of the instrument, and reading the instrument before me I come to the conclusion that it is not conditional. It begins with the two words "My will"; these words stand apart at the top of the document and are apparently intended to control all that follows. What follows is, I think, to be read in two parts—first, that which directs what is to be done if he die in India, and, secondly, that which directs what is to be done whether he die in India or not. I refer to the concluding words of the will: "all property belong to me at the time of my death to be desposed of to the best addvantage after paying all my expences the remainder to be paid to my wife." I do not regard these words as a mere repetition of the earlier words in the will, which are governed by the condition as to India, but as a general disposition of his property free from any condition whatever. If it can be said that the language used in the document is ambiguous, then I think that, on the authority of *In the Estate of Bryan* (1), I am entitled to take into consideration the declarations of the deceased man as deposed to by his widow; and these satisfy me that the language was intended to relate to a disposition of his property either in the event of his death in India or in the event of his return from that country.

I think the plaintiff is entitled to a grant of administration with this will annexed. The costs will come out of the estate.

Solicitors for plaintiff: *Booth & Smee.*

Solicitors for defendants: *J. N. Mason & Co., Agents for Sworder & Longmore, Hertford.*

(1) [1907] P. 125.

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1910
Feb. 10, 17.

HIGGINS *v.* THE KING'S PROCTOR.
THE KING'S PROCTOR *v.* CARTER.

Divorce—Practice—Costs—King's Proctor—Unsuccessful Intervention—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 2.

Sect. 2 of the Matrimonial Causes Act, 1878, confers upon the Court a discretion as to the costs of an intervention, whether by the King's Proctor or a member of the public, and the King's Proctor stands in precisely the same position as to costs as any other intervener, except that the Treasury may recoup him for any costs which he may pay to a successful petitioner under order of the Court.

There is no practice not to order the King's Proctor to pay the costs of an unsuccessful intervention, unless he has acted unreasonably in intervening.

Westcott v. *Westcott*, [1908] P. 250, approved and followed.

The first appeal was from a decision of the President (ante, p. 1) and the second from a decision of Bargrave Deane J. (ante, p. 4). The question raised on both appeals was the same—as to the liability of the King's Proctor to pay the costs of an unsuccessful intervention where he has acted reasonably in intervening.

In the first case, which was a husband's suit for divorce, the petitioner having obtained a decree nisi, the King's Proctor was put upon inquiry and intervened, and by his plea he alleged that material facts had been withheld by the petitioner from the knowledge of the Court and charged the petitioner with cruelty and adultery.

The intervention was heard before the President and dismissed, but the learned President stated that the King's Proctor had ample justification for intervening on the information supplied to him, and he reserved the question of costs.

On October 28, 1909, the President dismissed the intervention without costs on the ground that it was the settled practice of the Court not to order the King's Proctor to pay the costs of an unsuccessful intervention where no blame could be attached to him, but he granted leave to appeal.

The petitioner appealed.

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In the second case the wife petitioned for a divorce on the grounds of cruelty, desertion, and adultery, but at the hearing the charge of cruelty was not proceeded with. The suit was not defended, and on July 24, 1908, the President pronounced a decree nisi on the ground of desertion and adultery. The King's Proctor intervened, and by his plea he alleged (among other things) that the petitioner falsely alleged that the respondent had deserted her on and since January 10, 1906, whereas they had continued to live together in the same house at Cookham from that date until October, 1907, except for short periods when the respondent was away on business. The intervention came before the President on March 15, 1909, the petitioner's solicitors having in the meantime written to the King's Proctor stating that the allegation of desertion had been put forward under a misapprehension and that the petitioner withdrew the charge. Thereupon the decree nisi was rescinded, and the petitioner was ordered to pay the costs of the King's Proctor; but at the instance of the petitioner's counsel the President allowed the petition to remain on the file and to be amended by adding further charges of cruelty. He also intimated that the charge of adultery ought to be proved again, and that the King's Proctor would be well advised to watch the further proceedings.

The petition was subsequently reamended by adding further charges of adultery.

The King's Proctor intervened before the hearing of the reamended petition, and by his plea he alleged as follows: "1. That the said petitioner Hilda Carter and the said respondent Harold Edward Carter are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case. 2. That divers material facts concerning the conduct of the said petitioner and the said respondent have not been brought before the Court. 3. That the said respondent is not guilty of desertion as alleged in the said petition. 4. That the said respondent is not guilty of cruelty as alleged in the said petition, amended petition, and reamended petition. 5. That the said respondent is not guilty of adultery as alleged in the said petition and reamended petition." He therefore prayed that the petition might be dismissed, and that the petitioner and

respondent might be condemned in the costs of the King's Proctor.

At the hearing before Bargrave Deane J. the learned judge found that the King's Proctor had failed to prove collusion and that the petitioner had established the charges of cruelty and adultery, and he granted a decree nisi, but reserved the question of costs. On November 15, 1909, the learned judge, after reviewing the authorities, came to the conclusion that there existed no such practice as alleged by the President in *Higgins* v. *Higgins* and ordered the King's Proctor to pay the petitioner's costs, and he gave leave to appeal. The King's Proctor appealed.

Barnard, K.C., and *Bayford*, for the petitioners in both cases. Where the petitioner has kept back material facts from the Court the King's Proctor will get his costs of intervening, and even though the Court does not think fit to rescind the decree nisi: *Hunter* v. *Hunter* (1); *Hilbinger* v. *Hilbinger*. (2) Where the intervention has been brought about by the misconduct of the petitioner the petitioner, though successful, gets no costs: *Batley* v. *Batley* (3); *Forrester* v. *Forrester*. (4) Otherwise the King's Proctor pays the costs of an intervention which fails. It is said that it is the practice of the Court not to order the King's Proctor to pay the costs of an unsuccessful intervention unless he has acted unreasonably, and in the first case under appeal the President has adopted that view. But there is no such practice. The supposed practice is founded upon a decision of Sir Gorell Barnes in *Howard* v. *Howard* (5), which is only reported in *The Times* newspaper, but that decision, if correctly reported, is inconsistent with the considered judgment of the same learned President in the later case of *Westcott* v. *Westcott* (6), which shews that a petitioner who has been guilty of no misconduct gets costs against the King's Proctor where the intervention fails, even though the King's Proctor has acted reasonably; and the same course was adopted in *Deussen* v.

(1) [1905] P. 217.

(2) Unreported, November 23, 1908 (Sir Gorell Barnes).

(3) Unreported, December 3, 1880 (Sir James Hannen).

(4) Unreported, May 17, 1884 (Butt J.).

(5) Unreported, February 3, 1903.

(6) [1908] P. 250.

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Deussen (1) and *Sillitoe* v. *Sillitoe*. (2) Moreover, the alleged practice would have the effect of making s. 2 of the Matrimonial Causes Act, 1878, a dead letter. That is the enactment which regulates the costs of interventions, and it says the Court may make such order "as may seem just." The true effect of that section is to give the Court a discretion as to costs to be exercised according to the facts of each particular case. In neither of the cases under appeal has the petitioner been guilty of any misconduct, and there is therefore no reason why the King's Proctor should not be condemned in the costs of the unsuccessful intervention.

The Attorney-General (*Sir W. Robson, K.C.*) and *Gill, K.C.* (with them *W. O. Willis*), for the King's Proctor in the first case; and

The Attorney-General and *Rawlinson, K.C.* (with them *W. O. Willis*), for the King's Proctor in the second case.

It is not contended on behalf of the King's Proctor that there is any practice which binds the Divorce Court in this matter, but it is very desirable that the words of the statute "as may seem just" shall be construed in such a way as shall afford a guide to the Court in future, though without fettering its discretion. The case made against the King's Proctor is that he ought to be treated as an ordinary litigant, but that is not the true view of his position. He is a public official with very difficult important duties to perform, and he represents in a special sense the interests not only of the public, but of the children of the marriage. It is a condition precedent to the petitioner's right to relief that he shall prove his own merit. A statutory duty is cast upon the King's Proctor to institute an inquiry in a proper case, under the direction of the Attorney-General, whether or not the petitioner has earned the relief he claims, and the costs of resisting that inquiry are really part of the price of obtaining the divorce and ought not to be borne by the public. The cases shew that the King's Proctor has never been treated as an ordinary litigant. In *Smith* v. *Smith and Barnes* (3), where the President was not

(1) Unreported, November 26, 1896 (Sir Francis Jeune).

(2) Unreported, February 5, 1902 (Sir Gorell Barnes).

(3) Unreported, June 5, 1905 (Sir Gorell Barnes).

satisfied that the King's Proctor had acted unreasonably, he dismissed the intervention without costs in accordance with what he regarded as the usual practice. In the second case under appeal, even upon the view of the law submitted by the petitioner's counsel, the King's Proctor is not liable. In any case where the conduct—not necessarily the misconduct—of the petitioner is the real provoking cause of the intervention—where it has properly aroused the suspicions of the King's Proctor—justice requires that he should not be condemned in costs. That principle clearly applies to *Carter* v. *Carter*, because the misstatement of the petitioner put the King's Proctor in such a position that he could not avoid intervening.

Barnard, K.C., in reply. By the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7, if the King's Proctor intervenes otherwise than on the ground of collusion he does so merely as a member of the public: *Lautour* v. *Queen's Proctor* (1); and by the Act of 1878, on whatever ground he intervenes, he is not put on any other footing as regards costs than that of an ordinary litigant.

In the second case the conduct of the petitioner before the first decree has nothing to do with the matter. She made a false statement in that suit and she paid the penalty.

Cur. adv. vult.

Feb. 17. COZENS-HARDY M.R. These two appeals, which are presented by leave of the President and Bargrave Deane J., relate only to costs, but they involve the consideration of the position of the King's Proctor as unsuccessful intervener in divorce proceedings and the nature and extent of his duties and privileges.

By s. 7 of the Act of 1860 every decree for a divorce is in the first instance to be a decree nisi, and during the period, now six months, before it can be made absolute "any person" may shew cause why it should not be made absolute by reason of its having been obtained "by collusion or by reason of material facts not brought before the Court." The section goes on to

(1) (1864) 10 H. L. C. 685.

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provide that any person may give information to the King's Proctor of any matter material to the decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient. Now it was decided by the House of Lords in *Lautour* v. *Queen's Proctor* (1) that if the King's Proctor takes proceedings under that part of s. 7 to which I have referred he appears only as one of the public giving information to the Court, and not as a litigant entitled to receive or liable to pay costs. It is otherwise if he intervenes under the second part of s. 7 upon the ground of collusion only. Nothing turns upon that part of s. 7. The law on this point was amended by the Act of 1878. By s. 2, where the King's Proctor "or any other person" intervenes and shews cause against a decree nisi, the Court is authorized to make such order as to the costs of the King's Proctor or of any other person who shall intervene or shew cause or of any party to the suit occasioned by such intervention or shewing cause "as may seem just." And provision is made that the Treasury may, if it thinks fit, order any costs which the King's Proctor shall by order of the Court pay to a party to the suit to be deemed part of the expenses of his office.

Now on the construction of this section it is plain that there is jurisdiction to order the King's Proctor to pay the costs of an unsuccessful intervention. And there is nothing to indicate that he is placed in a different position from "any other person" except in so far as he has the public purse to fall back upon.

It has been strenuously argued by the Attorney-General that as the King's Proctor has highly important and delicate duties cast upon him in the public interest, and as he acts reasonably upon such information as reaches him, and under the direction of the Attorney-General, he ought not to be ordered to pay costs if the intervention should ultimately fail, and that the party who obtained the decree nisi ought to regard the costs of resisting the intervention as part of the price of obtaining the decree absolute, and the analogy of the wife's costs was relied upon. This analogy fails, for the liability to pay the wife's

(1) 10 H. L. C. 685.

costs depends upon statute or upon rules having statutory effect, and there is no such provision with respect to the King's Proctor's costs. I am unable to assent to the contention of the Attorney-General. It seems to me that by the Act of 1878 the costs of every intervention, whether started by the King's Proctor or by "any other person," are in the discretion of the Court, which is the meaning of the words "as may seem just," and that we ought not to assent to the suggestion that the King's Proctor occupies a position of special advantage. The petitioner for a divorce has been obliged to incur heavy costs by reason of the intervention, which, though reasonably started, has been proved to be without justification. Common fairness requires that, in the absence of some qualifying circumstances, the petitioner should recover these costs from the intervener. If the intervener is a private person he will be personally liable. If the intervener is the King's Proctor the burden will not really fall upon him, but upon the public whom he represents.

Both the President and Bargrave Deane J. seem to have taken this view, but the President considered that he was bound by the settled practice of the Divorce Court that the King's Proctor should never be ordered to pay costs unless he had acted unreasonably. It seems to me that a statutory discretion given to the judge ought to be exercised with reference to the facts of the particular case before him, unfettered by any supposed settled practice. But I am satisfied that there is no such settled practice as is suggested. I need only refer to the considered judgment of the late President in *Westcott* v. *Westcott*. (1)

It only remains to deal with the particular cases. In *Higgins* v. *Higgins* (2) there is no difficulty. The President would, in his discretion, have ordered the King's Proctor to pay the costs of the intervention but for the supposed settled practice. I feel no doubt that such an exercise of discretion would have been just. The appeal must be allowed with costs.

In *Carter* v. *Carter* (3) Bargrave Deane J., in the exercise of his discretion, ordered the King's Proctor to pay the costs of the intervention, and I see no reason to doubt that his discretion

(1) [1908] P. 250.

(2) Ante, p. 1.

(3) Ante, p. 4.

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was properly exercised. The petitioner was condemned in the costs of an earlier intervention, in which the King's Proctor succeeded. But this circumstance in no way justifies the contention that the costs of the subsequent intervention, in which he failed, should not be paid by him. I may add that the learned judge, who saw the petitioner in the witness-box, believed her testimony and expressly exonerated her from moral blame. This appeal must be dismissed with costs.

FLETCHER MOULTON L.J. These two cases raise an important question with regard to the costs of the King's Proctor in cases in which he intervenes under the statutory powers and duties given to him when he charges collusion as well as when he intervenes in the position of a member of the public on other grounds. In both cases the intervention was unsuccessful. In *Higgins* v. *Higgins* (1) the President of the Probate Division refused to dismiss the intervention with costs on the ground that he did not think it unreasonable conduct on the part of the King's Proctor to intervene, and that it was settled practice that if there was no reason to blame the King's Proctor in respect of the intervention he ought not to be ordered to pay the costs. In *Carter* v. *Carter* (2), which was decided a little later, and in which case also Bargrave Deane J., who tried the case, was of opinion that no fault could be found with the King's Proctor for intervening, he was ordered to pay the costs of the intervention, the learned judge holding that no such settled practice existed as that which the President had purported to follow in *Higgins* v. *Higgins* (1); and accordingly he dismissed the intervention with costs against the King's Proctor.

The question for us to decide is as to what are the principles upon which the costs of an unsuccessful intervention should be ordered to be borne, and, having settled the principle, what order ought to be made in each of the individual cases before us.

No doubt or difficulty exists as to the statutory power of the Court with regard to these costs. Prior to the Matrimonial Causes Act, 1878, the King's Proctor could only receive costs in

(1) Ante, p. 1. (2) Ante, p. 4.

respect of an intervention on the ground of collusion, which is the only statutory function which the King's Proctor possesses in this respect. But the King's Proctor, like any other member of the public, has a right to intervene on other grounds. By the decision in *Lautour* v. *Queen's Proctor* (1) it was decided by the House of Lords that there was at that time no power to give costs to the King's Proctor in respect of any other matter than a plea of collusion, even though his intervention was successful. In cases where he intervened on other grounds than collusion he was held to be in the same position as any other member of the public doing the like, and the Court had no statutory power to give him costs in respect of such intervention. To remedy this state of things the Matrimonial Causes Act, 1878, was passed. It provides as follows: "Where the Queen's Proctor or any other person shall intervene or show cause against a decree nisi in any suit or proceeding for divorce or for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto, occasioned by such intervention or showing cause as aforesaid, as may seem just"; and if anything were necessary to make it clear that this enactment authorizes the Court in proper cases to direct the King's Proctor to pay costs, special reference is made in the proviso at the end of the section to such a case. It is therefore clear that the Court has full power to direct that the costs of an intervention shall be borne by any party thereto, including the King's Proctor. And the words "as may seem just" make it a matter in the discretion of the Court.

The Attorney-General on behalf of the King's Proctor argued that although this is so a settled practice prevents the Court from making an order for costs against the King's Proctor except in cases where he has acted unreasonably. Before inquiring whether any such practice exists I wish to state emphatically that, in my opinion, where costs are left by statute in the discretion of the Court, the power and duty of deciding in each case and from the circumstances of the case how that discretion

(1) 10 H. L. C. 685.

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should be exercised cannot be taken away by any decision of the Court, or even by any series of decisions. When the Legislature directs that the Court shall make such order as it may deem just it is not giving to a judge the authority to displace that statutory enactment by a fixed rule merely because he chances to be the first judge who is called upon to exercise that discretion or because he may in one or many cases think that justice requires that he should follow one and the same course. He cannot take away from his successors or from himself the power and duty of deciding in a future case according to the circumstances of that case. No doubt the fact that eminent judges in the past have taken a particular view as to the circumstances which justify a particular order and the reasons which they have given for adopting a particular course will influence their successors, but they do not bind them, nor do they excuse those successors from exercising their judgment afresh in each individual case. It is therefore only under protest that I examine the question as to whether any such settled practice does exist in the matter. Even if I should find that it does, it would not in my opinion decide these appeals.

The cases that have been cited to us convince me that no such settled practice exists. The contention of the King's Proctor is based mainly on the report in *The Times* newspaper of the judgment of the present Lord Gorell in *Howard* v. *Howard* (1), which appears to lay down the principle that an order for costs should not be made against the King's Proctor except in cases where he has acted unreasonably in intervening. I doubt the accuracy of that report. It makes the learned judge treat as a settled practice a course which is diametrically opposed to that which he followed in the case of *Sillitoe* v. *Sillitoe* (2) in 1902 and *Westcott* v. *Westcott* (3) in 1908, the latter being a considered judgment in which the matter is gone into in the most careful and elaborate manner. It is impossible in the face of such cases as these to hold that there is any such settled practice as is contended for, and in my opinion the question whether or not the King's Proctor should be ordered to pay the costs of an unsuccessful

(1) Unreported, February 3, 1903. (2) Unreported, February 5, 1902.
(3) [1908] P. 250.

intervention is a matter which both by statute and by the practice of the Court remains in the discretion of the tribunal. I shall therefore proceed to examine the circumstances of the two cases in order to see what order ought to be made with regard to the costs in each of them.

The case of *Higgins* v. *Higgins* (1) presents no difficulty. It is a plain case where the King's Proctor intervened on various grounds and failed on all of them. I can see no reason in justice why he should not bear the petitioner's costs caused by his intervention. It has been urged before us that he is a public officer acting on behalf of the public, and that therefore it is a hardship to make him pay the costs occasioned by his action against the petitioners. I entirely fail to appreciate the force of this remark or even the appropriateness of the word "hardship." No one supposes that the King's Proctor will personally have to pay these costs. He is acting on behalf of the public against an individual, and it seems to me immeasurably more just that if he fails the public should bear the costs of the mistaken action of their representative (which will be the result if the intervention is dismissed with costs) than that the individual petitioner should bear them. I am of opinion, therefore, that this appeal should be allowed with costs, and that the intervention should be dismissed with costs against the King's Proctor.

The facts of the case in *Carter* v. *Carter* (2) are somewhat different. In this case the petitioner was wrong in the first instance by alleging and swearing to a desertion for two years. The King's Proctor therefore rightly intervened after the decree nisi had been pronounced. The petitioner admitted that she was in the wrong, and the King's Proctor received the costs of his intervention and the decree nisi was rescinded. But the petitioner obtained leave to amend the petition (which had from the first contained a charge of cruelty) by adding further charges of cruelty and adultery. The King's Proctor elected again to intervene. On this occasion he intervened before the trial and filed pleas alleging collusion and various other matters. I am by no means satisfied that he had a right so to do, but it is not necessary

(1) Ante, p. 1. (2) Ante, p. 4.

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to decide the point. The case went to trial on those pleas and the King's Proctor failed to support them. It is urged on his behalf that the fact that the petitioner had sworn to a charge of desertion for two years, which she subsequently admitted to be unfounded, amounted to conduct justifying the intervention, and that therefore, as it was the petitioner's own misconduct that afforded ground for intervention, costs should not be given against the King's Proctor. I think that there is here a confusion of thought. The decree obtained by the erroneous evidence was rescinded and the King's Proctor received his costs. But I can find no misconduct on the part of the petitioner in respect of any of the matters which thereafter formed the subject-matter of the inquiry. The learned judge saw the petitioner and heard her evidence, and came to the conclusion that she had acted with perfect bona fides in the matter, and that she thought that absence of marital intercourse constituted desertion, although she was living in the same house as her husband. I do not think that we should be justified in departing from this considered finding of the learned judge, and I look upon the second intervention of the King's Proctor as relating solely to the charges of adultery and cruelty and collusion against the respondent, in respect of all of which it failed. I can see, therefore, no reason why we should set aside the order as to costs which the learned judge made in the exercise of his discretionary power. He acted on no mistaken view as to his powers or his duty, and therefore his appeal should be dismissed with costs.

BUCKLEY L.J. Sect. 7 of the Matrimonial Causes Act, 1860, provides that if the King's Proctor suspects that any parties to the suit are or have been acting in collusion he may, under the direction of the Attorney-General, intervene alleging collusion, and empowers the Court to order the parties, or such of them as it shall see fit, to pay his costs. It does not empower him to intervene in any case other than that of collusion. If he intervenes, as he may, on other grounds, or if intervening upon the ground of collusion he advances other grounds, he must in such respects other than collusion be treated as one of the public

coming in to bring before the Court facts for the Court's information which had not been presented to it by the parties: see Lord Westbury's opinion in *Lautour* v. *Queen's Proctor*. (1) By s. 2 of the Matrimonial Causes Act, 1878, further provision is made as to costs of intervention. That is a section which comprises in one class the King's Proctor and any other person who intervenes and the parties to the proceeding, and provides in the same sentence that the Court may make such order as to the costs of all or any of those persons occasioned by such intervention as may seem just. The section contains a proviso at the end relating to reimbursement by the Treasury to the King's Proctor of any costs which the King's Proctor shall by any order of the Court made under that section have to pay. There is in this section no discrimination between costs incurred by the King's Proctor upon an intervention on the ground of collusion and costs incurred by him upon an intervention on other grounds. Where he intervenes as one of the public, that is, upon grounds other than collusion, I see no reason for saying that he does not stand in exactly the same position as to costs as any other intervener. The same, I think, is true in the case where he intervenes on the ground of collusion. His costs of intervention (be it made on what ground it will) are alike dealt with by the section upon the same footing. The only relevant question therefore, I think, in determining whether the King's Proctor shall be ordered to pay costs or not is whether it seems just to the Court that he should be so ordered to pay.

We have been strongly pressed with an argument that the King's Proctor stands in an exceptional position. It is argued that if he intervenes upon reasonable grounds he ought not to be ordered to pay costs, notwithstanding that his intervention is wholly unsuccessful. In my opinion the question whether he has acted reasonably or not is not as between the King's Proctor and the other parties to the proceedings a ground upon which to act in determining whether or not to order him to pay costs. The question whether the conduct or misconduct of the parties has rendered the intervention necessary may be a ground. As between the King's Proctor and the Treasury the question

(1) 10 H. L. C. 685, 700.

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whether he has acted reasonably or not may well be material. But as between the King's Proctor and the parties to the proceedings the question is to be determined, I think, upon considerations similar to those to which the Court will in every case have regard in considering how, in its discretion, it ought to award costs in respect of a contention which has been raised and has failed. In this I see no hardship upon the King's Proctor. He ought, of course, to be placed, and upon grounds of public policy I think it essential that he should be placed, in a position in which in the proper conduct of his office he should be fearless as to costs in determining whether upon the information which reaches him he ought or ought not to intervene. But this is to be ensured not by depriving of costs parties who are entitled to them, but by the loyal support of the Treasury in accepting responsibility for the acts of a public officer acting reasonably and under the direction of the law officer of the Crown. If such support be not accorded it would seem to me impossible for a person of integrity and self-respect to accept the duties of the office.

It is plain, and indeed is not disputed, that the statute empowers the Court to award costs against the King's Proctor as may seem just. In *Higgins* v. *Higgins* (1) Sir John Bigham decided as he did upon the footing that there existed a practice not to give costs against the King's Proctor who is unsuccessful in his intervention if there is no reason to blame him for intervening. In my judgment no such practice exists, and if there were such a practice it would be erroneous. If the King's Proctor intervenes and succeeds—or succeeds as to some of the grounds of his intervention—he will get his costs—*Hunter* v. *Hunter* (2)—or get his costs of the issues upon which he succeeds: *Hilbinger* v. *Hilbinger*. (3) If he intervenes and fails the Court may in its discretion either make no order as to costs or give costs against him. In determining which course to take the Court may, no doubt, regard amongst other material circumstances the question whether the parties by conduct—not necessarily by misconduct—have brought the intervention and its

(1) Ante, p. 1.
(2) [1905] P. 217.
(3) Unreported, November 23, 1908 (Sir Gorell Barnes, President).

consequent costs upon themselves and may give no costs—*Batley* v. *Batley* (1); *Forrester* v. *Forrester* (2)—or may, even though his conduct has been perfectly reasonable, dismiss his intervention with costs: *Deussen* v. *Deussen* (3); *Sillitoe* v. *Sillitoe*. (4) There is a decision of Sir Gorell Barnes in *Howard* v. *Howard*, a report of which, taken from *The Times* newspaper of February 4, 1903, is to be found in [1910] P. 8. Sir Gorell Barnes is there reported to have said that unless the King's Proctor acted unreasonably he ought not to be condemned in costs. This report cannot, I think, be accurate, for the language attributed to the learned President is directly in contradiction of his own words in the subsequent case of *Westcott* v. *Westcott* (5), where, after stating that it had been argued that the King's Proctor, unless he acts unreasonably, cannot be or ought not to be condemned in costs, says, "I cannot agree with that view." In *Westcott* v. *Westcott* (5) Sir Gorell Barnes discussed the whole matter, and, while holding the intervention to be quite reasonable and properly conducted, held that, inasmuch as it was unsuccessful and the petitioner was not in any way to blame, the King's Proctor ought to pay the costs.

These are the authorities, and they shew, in my opinion, that no such practice has prevailed in the Court as Sir John Bigham thought himself constrained to follow in *Higgins* v. *Higgins*. (6) From his judgment in that case and from what he said subsequently in *Howe* v. *Howe* (7), his opinion when he decided *Higgins* v. *Higgins* (6) was that the fact that the King's Proctor had failed ought to be sufficient to justify him in fixing him with costs, although his intervention had been reasonable, and he would have made an order against him for costs, but that he supposed himself to be bound by an established practice. We ought now to exercise our discretion in the way in which he should and would have exercised his if he had not felt himself

(1) Unreported, December 3, 1880 (Sir James Hannen).
(2) Unreported, May 17, 1884 (Butt J.).
(3) Unreported, November 26, 1896 (Sir Francis Jeune, President).
(4) Unreported, February 5, 1902 (Sir Gorell Barnes, President).
(5) [1908] P. 250, 253.
(6) Ante, p. 1.
(7) [1910] W. N. 30.

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bound by a supposed practice, and ought, I think, to give costs against the King's Proctor in *Higgins* v. *Higgins* (1) and accordingly to allow the appeal in that case.

As regards the case of *Carter* v. *Carter* (2), I need not add anything to what has been said as to the reasons why the discretion should be exercised in the same way. In that case I agree with the judgment of Bargrave Deane J. and think that in *Carter* v. *Carter* (2) the appeal should be dismissed. The result is that in *Higgins* v. *Higgins* (1) the appeal should be allowed with costs, and in *Carter* v. *Carter* (2) the appeal should be dismissed with costs.

First appeal allowed.
Second appeal dismissed.

Solicitors for petitioner in the first appeal: *Smith, Rundell & Dods, for Evan Davies, Cardiff.*

Solicitors for petitioner in the second appeal: *Braby & Waller.*

(1) Ante, p. 1. (2) Ante, p. 4.

H. B. H.

WESTLAKE *v.* WESTLAKE (OTHERWISE WILLIAMS).

1910
Jan. 12;
Feb. 4.

Divorce—Practice—Civil Marriage in the Channel Islands—Foreign Law—Evidence.

Where, in the case of a marriage in the Channel Islands, the marriage ceremony has been celebrated elsewhere and otherwise than in a church in accordance with the rites and ceremonies of the Established Church of England and Wales, evidence of the validity of the marriage according to the local law is still required.

UNDEFENDED SUIT FOR NULLITY.

The petitioner, Dudley Westlake, prayed for a decree of nullity by reason that the respondent was the sister of his former wife, who had obtained a divorce from him on the ground of his incestuous adultery with the present respondent, and who was still living. The petitioner was domiciled in England.

When the petition was presented, the registrar required the following undertaking in writing to be given by the petitioner's solicitor:—

"I, the undersigned solicitor for the petitioner, undertake to bring to the notice of the judge at the trial of this suit the fact that the registrar hesitated to allow the petition herein to be sealed, upon the ground that the petitioner, in going through the ceremony of marriage with the sister of his first wife, might not be entitled to come to this Court and seek the relief sought by the present petition.

"Dated this first day of September, 1909.

"(Signed) Hugh Rose-Innes,

"Petitioner's Solicitor."

The petitioner and respondent were married on November 28, 1903, in the office of the superintendent registrar of the island of Jersey, by licence, and the document lodged in Court was certified under the hand of the superintendent registrar to be a true and faithful extract from the register of the parish of St. Helier, in the island of Jersey.

Durley Grazebrook, for the petitioner. The petitioner's solicitor has complied with the undertaking required by the registrar.

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There is nothing in the registrar's objection. The petition is quite regular, even if the ceremony of marriage now in question had taken place after the Deceased Wife's Sister's Marriage Act, 1907, came into operation. (1)

[BARGRAVE DEANE J. That is quite clear.]

The only point of practice involved arises from the fact that the ceremony of marriage now in question was a civil ceremony. Although in recent times certificates of marriages solemnized in the Channel Islands according to the rites and ceremonies of the Established Church of England and Wales have been accepted in this Court as sufficient proof of such marriages, on the ground that the Channel Islands are within the ecclesiastical jurisdiction and form part of the diocese of Winchester, this is the first known instance of a civil ceremony of marriage becoming the subject of adjudication in this Court; and it would seem that the Court will require evidence of a legal expert as to the law of the Channel Islands before pronouncing a decree in such a case. [He referred to Hammick's Marriage Laws, 2nd ed. (1887), p. 239.]

BARGRAVE DEANE J. I should not require evidence as to the law if the ceremony of marriage had been celebrated in a church according to the rites and ceremonies of the Established Church of England and Wales; but you are right in saying that evidence must be given in proof of a marriage celebrated within the Channel Islands in any other place and form. You may prove the facts of the case to-day, and I will then adjourn it for expert evidence as to the law and the admissibility of the document before me. I will allow that evidence to be given by the affidavit of an expert acquainted with the law of the Channel Islands.

Feb. 4. The affidavit of Henry Edward Le Vavasseur Durell, barrister-at-law, and His Majesty's Solicitor-General for the

(1) 7 Edw. 7, c. 47, s. 3, sub-s. 2, is as follows: "Notwithstanding anything contained in this Act or in the Matrimonial Causes Act, 1857, it shall not be lawful for a man to marry the sister of his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife."

island of Jersey, stated in substance as follows: "The document now produced and shewn to me (and marked) is an official extract from the register of the parish of St. Helier, in the island of Jersey, and relates to the marriage which took place [between the petitioner and respondent as therein stated]. The marriage so solemnized is prima facie a valid marriage, and the document hereinbefore referred to (and marked) would be accepted in the Courts of Jersey as prima facie evidence of such marriage. I have been in practice for forty years and upwards as an advocate of the Royal Court of Jersey and am well acquainted with the laws regarding marriages which take place in the island of Jersey."

BARGRAVE DEANE J. pronounced a decree nisi.

Solicitor: *Hugh Rose-Innes.*

H. D. G.

IN THE ESTATE OF EDITH MARY FRENCH.

1910
March 14.

Probate — Practice — Intestacy — Administration — Disappearance of Administrator—Motion—Revocation—Fresh Grant to Creditor.

The original administrator of a deceased intestate disappeared and could not be traced. Fresh assets having become payable to the legal personal representative of the deceased, and the next of kin, other than the original administrator, declining either to renounce or to apply for a grant, the Court revoked the original letters of administration which had been granted to the deceased's brother, and made a fresh grant at the instance of a creditor.

EDITH MARY FRENCH, late of the Stone Asylum, near Aylesbury, in the county of Buckingham, died on December 12, 1900, a spinster, without parent and intestate, leaving a brother and two sisters of the whole blood and three sisters of the half blood, these last being under the age of twenty-one years.

On July 10, 1901, the brother took a grant of letters of administration, the personal estate being sworn under 400*l.* gross value.

Within a year after taking the said grant the administrator,

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Henry Lewin French, disappeared, and all efforts to trace him had failed. The last communication said to have been received by any member of the family was in May, 1902, when he wrote from an address at Dudley, in Worcestershire, telling one of his sisters that he was leaving there shortly and that she was not to write to him until she heard from him again. Letters since addressed to him had been returned through the dead letter office.

By two orders dated respectively December 7, 1907, and July 28, 1908, made in an action in the Chancery Division for the administration of the estate of William Henry French, deceased, the father of Edith Mary French, two sums of 402*l.* 2*s.* and 116*l.* 2*s.* 10*d.* were directed to be paid to Henry Lewin French, as administrator of the estate of Edith Mary French, deceased.

The solicitors who acted for the said administrator in the said Chancery proceedings stated that they had heard nothing of him since April, 1903, and they had handed over to the solicitors for the present applicants the letters of administration granted on July 10, 1901, to be dealt with as this Court might think fit.

The guardians of the poor of the Winslow Union claimed against the estate of Edith Mary French for her maintenance in the lunatic asylum at Stone from November 4, 1899, till her death, the said claim amounting to 25*l.* 14*s.* 9*d.* The only estate unadministered consisted of the before-mentioned sums in the Chancery Division.

Mr. William Norris Midgley, the clerk to the guardians of the Winslow Union, now applied that the grant to the brother should be revoked, and that a fresh grant should be made to himself as the nominee of the said guardians, as creditors of the deceased's estate.

The next of kin had declined to move in the matter or to renounce, and the solicitors or agents for the two sisters and for the natural guardian of the half-sisters of the deceased had been served with notice of motion and had verbally intimated to the solicitors for the applicant that it was not their intention to intervene in any way and that the guardians must be left to take whatever course they might be advised.

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Le Bas, in support of the motion.

[SIR SAMUEL EVANS, PRESIDENT. Is the practice correctly stated in Tristram and Coote's Probate Practice, 14th ed. (1906), p. 181? "The Court cannot revoke at the application of a creditor, whatever may be the merits of the case, because such creditor cannot demand a grant to be made to himself of immediate right." The case there cited in support of the statement does not appear to be an authority for it.]

The accuracy of that proposition is very doubtful, but no reported authority can be produced to the Court against it at the moment. The case there cited as an authority, *In the Goods of Bergman* (1), has nothing whatever to do with it. As the next of kin in the present case will not do anything—they will neither renounce nor take a grant—it would be tantamount to a denial of justice and would create a complete deadlock if, because the holder of the outstanding grant cannot be found, the Court were to hold that the grant could not be revoked at the instance of a creditor of the deceased. *In the Estate of Ellen Saker* (2) may be said to furnish some precedent for the present application.

SIR SAMUEL EVANS, PRESIDENT. I see no reason, in principle, why creditors should be precluded from applying to revoke an existing grant: otherwise, as in the present instance, a deadlock in the administration of an estate might occur. The letters of administration granted in 1901 to the deceased's brother will be revoked, and, upon the applicant filing evidence to the satisfaction of the registrar that he has been duly nominated by the guardians to act for them in this matter, he may take a fresh grant, as the nominee of the guardians.

Solicitors: *Geo. Reader & Co.*

(1) (1842) 2 Notes of Cases, 22. (2) [1909] P. 233.

H. D. G.

1910
Feb. 28.

THE ASTRAKHAN.

Admiralty—Collision—Damage—Warship—Loss of Use during Repairs—Claim in the Nature of Demurrage.

A Danish warship was just completing a long winter training cruise when she came into collision, in the Sound, with a British vessel, and in an action of damage by collision, brought by the Danish Government against the owners of the British vessel, the British vessel was found alone to blame. In ordinary course, the warship would have been docked and overhauled, and not put into commission until three months had elapsed, and would then have been used for a summer training cruise. Before the expiration of the three months the repairs necessitated by the collision were executed, and the vessel ready to be put into commission. At the reference for the assessment of the damage sustained by the warship a claim of 1500*l.* for the loss of the use of the vessel was disallowed. On objection to the report:—

Held, that the principles laid down in *The Mediana*, [1900] A. C. 113, with reference to damages for deprivation of the use of a chattel, were applicable to the case of a warship, and, therefore, as, by reason of the wrongful act of the defendants, the Danish Government had not for a period of twenty-two days—during which the repairs rendered necessary by the collision were being executed—had the vessel under their control for use if they wanted her, the registrar was directed to assess the damages on the basis of that portion of the three months, thereby reducing the amount claimable under the head of deprivation of the use of the vessel to something under 400*l.*

Petition in objection to registrar's report.

The petitioners (plaintiffs) were the King and Government of Denmark.

The respondents (defendants) were the owners of the steamship *Astrakhan*.

The case is reported on the question as to damages, in the nature of demurrage, recoverable from the wrong-doer in the case of the detention of a warship whilst undergoing repairs after collision.

On February 19, 1909, the *Heimdal*, a Danish third-class steel twin-screw protected cruiser of 1341 tons displacement, manned by a crew of 150 hands, and valued at 55,000*l.*, whilst proceeding from Harwich to Copenhagen, was near the Lappegrunde light vessel in the Sound, when she came into collision with the *Astrakhan*, a steel screw steamship belonging to the port of Liverpool, of

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3438 tons gross register, from Copenhagen to the river Tyne in water ballast. The *Heimdal* was struck by the stem of the *Astrakhan* a heavy blow on the starboard side and was greatly damaged. Her armoured deck was cut into for a distance of about 2½ feet, and the penetration in her side extended as far down as the bilge keel. The compartment in the way of the damage was flooded, and a "collision mat" was placed over the damaged part, secured by means of chains passed under the bottom of the vessel, but the pressure of the water in the portion flooded brought a strain on a longitudinal bulkhead which was not very strong, and, on this account, it was not considered prudent to remove the collision mat until the *Heimdal* on February 20 entered the dry dock. Whilst the dry dock was being pumped out it was seen by a movement of the vessel that something was wrong. The pumping was therefore stopped, the dock was refilled, and a diver who was sent down found that one of the blocks had been displaced by the collision mat chain, and the bottom of the *Heimdal* was afterwards found to have been set up and damaged by the displaced block.

On June 25, in an action of damage by collision brought by the plaintiffs, the King and Government of Denmark, against the defendants, the owners of the *Astrakhan*, the British vessel was found alone to blame on the ground of excessive speed in fog.

On October 29 this decision was affirmed by the Court of Appeal, and the claim of the plaintiffs for the amount of damage sustained by the *Heimdal* was pronounced for subject to a reference to the registrar assisted by merchants.

On December 16 the assessment of the amount of the damage was proceeded with and a total sum of 1640*l.* 11*s.* 10*d.* was allowed, made up of four items: repairs (1608*l.* 5*s.* 11*d.*), survey fees (19*l.* 3*s.* 3*d.*), articles lost during the collision (7*l.* 17*s.* 8*d.*), telegrams, &c. (5*l.* 5*s.*); but a fifth item, being a claim of 1500*l.* for the loss of the use of the vessel, was disallowed, the registrar, on December 20, giving as his reasons for rejecting this item that "The *Heimdal* was then (at the time of the collision) just completing a long winter cruise for the purpose of training conscripts, and, in ordinary course, would have been overhauled and dry docked and not put into commission until June 1, and

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then for the purpose of training cadets. During the interval, she would have been laid up in harbour, and, it was stated, have been regarded as a stand-by ship. But as no war occurred the Danish Government have not been deprived of her use as a vessel of war. As it was, the repairs were begun on February 26, but were not completed till May 29, and the *Heimdal* was then, on June 1, put into commission for cadet training in the ordinary course of her work, and the Government—as regards the use of the vessel—was in exactly the same position as if no collision had taken place. The plaintiffs, however, claim damages for loss of use of the *Heimdal*, and the question therefore arises as to what loss, if any, has been caused to the Government of Denmark by the collision. It is admitted by the defendants that the Danish Government has suffered loss through the cost of the necessary repairs, but it is denied that it lost the use of the *Heimdal*, because she would not, if there had been no collision, have been used before June 1. The fact that the *Heimdal* is a ship of war does not, I think, prevent the plaintiffs from recovering damages for the loss of her use, if in fact a loss of use can be proved. In *The Marpessa* (1) Lord Loreburn said in regard to a claim in respect of a dredger, 'She earns nothing in money and costs a good deal, but she does indispensable service in clearing away the sand,' and in the same case Lord Loreburn pointed out that *The Greta Holme* (2) shewed that damages could be recovered in respect of the loss of the use of a non-commercial vessel, which, though it made no money, 'rendered services.' Actual money damages were, before 1897, refused to harbour authorities and similar bodies in respect of the loss of the use of their vessels, because they could not shew actual pecuniary damage. But in the cases which have corrected this view there has always been an actual loss of use of the injured vessel. In the present case, I find as a fact on the evidence that there has been no loss of use of the *Heimdal*. The basis of the head of claim for damages for loss of the use of the *Heimdal* therefore is not established, and this item of the claim is therefore rejected.

"It may be desirable to say that had I arrived at a contrary opinion, I should, on the principles of assessment stated by Lord

(1) [1907] A. C. 241, at p. 244. (2) [1897] A. C. 596.

Gorell in *The Marpessa* (1), have assessed the damages of the Danish Government at 400*l*.

"A small item of 55*l*. 10*s*. for damage to the bottom of the vessel whilst docking was also in dispute. This damage is not sufficiently contemporaneous in point of time to the collision to make it one of those circumstances which must, under the decisions, be presumed to be attributable to the collision, and it is not clear from the evidence that this claim is sufficiently proved, to be held to be a reasonable consequence of the collision."

The evidence before the registrar, relating to the claim for loss of use of the vessel, was given orally by the captain of the *Heimdal* and the engineer of the royal dockyard at Copenhagen. The costs of the attendance of these witnesses were disallowed by the registrar.

1910. Feb. 28. *Laing, K.C., Batten, K.C.*, and *C. Robertson Dunlop*, for the petitioners (plaintiffs), the King and Government of Denmark, in objection to the registrar's report. It is submitted that the registrar ought to have awarded damages to the plaintiffs for being deprived of the use or power of user of the *Heimdal* for any purpose, aggressive, defensive, or ceremonial, for which she might have been required. The vessel was put into dry dock at Copenhagen to repair the collision damage. The repairs were carried out promptly and were not completed until May 29, the result being that the King and Government of Denmark were deprived of the use or power of user of the *Heimdal* for ninety-nine days.

If there had been no collision the *Heimdal* would have gone to the naval dockyard at Copenhagen and effected such small repairs as were necessary after her cruise, and would have remained afloat in the dockyard ready to be commissioned. She would have been commissioned in forty-eight hours, and been ready for any purpose. If not required for any other purpose on June 1, she would have been commissioned for a summer training cruise, and, after the collision repairs were finished, she was in fact so commissioned.

In *The Greta Holme* (2) it was held that though trustees,

(1) [1906] P. 14. (2) [1897] A. C. 596.

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charged with the duty of maintaining a harbour and waterway, were not out of pocket in any definite sum, they were entitled to recover damages for the loss of the use of their dredger through a collision. In *The Mediana* (1) the same harbour board was held entitled to recover from the wrong-doer not only the out of pocket expenses caused by the collision, but also substantial damages for the loss of the services of a damaged lightship during the time her place was taken by a substituted lightship, and Lord Halsbury, in his judgment in that case, lays great stress upon the right to damages for the deprivation of the use of the thing, and asks, "what right has a wrong-doer to consider what use you are going to make of your vessel?" The same learned judge in *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda* (2) deals with one of the arguments raised in this case, namely, that the principle does not apply to a warship because a warship does not earn money. He says: "I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time, would prove the fact of damage if the party was deprived of it."

In *The Marpessa* (3) the mode of ascertaining the measure of damage in this class of case is pointed out, and the registrar states that, if damages are to be awarded, he has followed that case by giving 400*l.*; but if the sum is worked out in accordance with the principles laid down by the then President of this Court (Sir Gorell Barnes) (4), the amount would be about 1100*l.*

The item of 55*l.* 10*s.* for damage to the bottom of the vessel should also have been allowed, as the collision mat was put in position immediately after the collision to prevent the water getting in, and it was proper to keep it in that position until the vessel got into dry dock.

The oral testimony of the witnesses, called at the reference, was also material to the inquiry, and the costs of their attendance should have been allowed.

Aspinall, K.C., and *D. Stephens*, for the respondents (defendants), the owners of the *Astrakhan*. The registrar exercised a

(1) [1900] A. C. 113, at p. 117.
(2) [1905] A. C. 6, at p. 12.
(3) [1907] A. C. 241.
(4) [1906] P. 14.

right discretion in rejecting the claim for 1500*l.* for the loss of the use of the *Heimdal*, for the evidence shewed that no loss in fact arose through what has been termed the deprivation of her use. At the time of the collision the *Heimdal* was just completing her winter cruise, at the end of which she would go into the dockyard and remain laid up there until June 1—that is to say, she would remain there because until June 1 there was no longer any use for her. The repairs rendered necessary by the collision were completed in May, and the vessel was put into commission on June 1. No evidence was adduced to shew that the *Heimdal* was required for any other purpose until that date. Apart from the items allowed by the registrar, no loss was suffered or expense incurred over and above that which would have been incurred if there had been no collision, and, if the vessel had been laid up in the dockyard, further expense would have been incurred on account of a portion of her crew remaining by her to keep her in order. This expense was avoided by reason of the *Heimdal* being in dry dock undergoing repairs.

In the case of *The Mediana* (1) the Mersey Docks and Harbour Board were held entitled to damages for the loss of the services of the damaged lightship during the time her place was taken by the substituted lightship, for the board was deprived of her use, and the fact that the board had prudently provided a stand-by did not alter the position; but it would be contrary to the admiralty doctrine of restitutio in integrum to give damages when there was in fact no deprivation of the use of the vessel.

In the case of *The Greta Holme* (2) Lord Morris, the dissenting judge, refers to the case of *The Rutland* (3), where the registrar did not allow any sum for the detention of the dredger whilst undergoing repairs, and the learned judge quotes a passage from the judgment of Lord Hannen put in the form of a question: "What damages capable of being estimated in money have the harbour authorities suffered by this dredger being disabled? There has been a great deal of evidence and the registrar has come to the conclusion that it has not been shewn that any tangible damage has been done to the owners of the

(1) [1900] A. C. 113. (2) [1897] A. C. 596, at p. 606.
(3) [1896] P. 195, n. (2).

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dredger, and none of the things that were indicated or that were sought after have been established"; and Lord Herschell said (1) that "the true explanation of the case (*The Rutland* (2)) is that the learned judge was not satisfied that any damage was sustained, inasmuch as the wrongful act might only have caused the dredger to be idle at one time rather than another without detriment to the plaintiffs." That reasoning applies to this case, for the *Heimdal* would, collision or no collision, have been laid up—that is, she would have been in the dockyard all the time that the collision necessitated her being in dry dock.

In *The Bodlewell* (3) the vessel was temporarily put out of employment, by reason of a collision, at a time when she was being worked at a loss, and the cases which have been cited by the plaintiffs in this case were cited there in support of the objection to the registrar's report disallowing other than out of pocket expenses; but it was held that general damages, apart from actual expenses, were not recoverable from the owner of the wrong-doing ship, as no loss could be shewn to have resulted from the deprivation of the use of the vessel.

With regard to potential user, and the possibility of war, in respect of which a larger sum than the 400*l.* assessed by the registrar is now claimed by the plaintiffs, the remarks of Sir Gorell Barnes in *The Marpessa* (4)—when refusing to make a larger allowance than that the district registrar had given—apply, namely, that the Court will not embark "upon a sea of assumptions and possibilities."

In *The City of Peking* (5) it was held that indemnity for consequential loss from detention of a vessel can only be recovered where there has been actual loss resulting therefrom, together with reasonable proof of its amount, and though Lord Halsbury in *The Mediana* (6) distinguishes this case, the principle underlying it remains, and this principle is stated by Sir Barnes Peacock in delivering the judgment of the Privy Council thus: "The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does

(1) [1897] A. C. 596, at p. 605.
(2) [1896] P. 195, n. (2).
(3) [1907] P. 286.
(4) [1906] P. 14, at p. 33.
(5) (1890) 15 App. Cas. 438.
(6) [1900] A. C. 113, at p. 119.

not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary: actual loss and reasonable proof of the amount."

With regard to the claim for 55*l.* 10*s.* in respect of injury to the bottom of the *Heimdal* the evidence shews that, on going into dry dock, the vessel did not take the blocks true. This was due to carelessness amounting to negligence in handling the chain which held the collision mat in its place and cannot be charged to the defendants as a consequence of the collision.

The plaintiffs were properly held not entitled to the costs of the attendance of the witnesses in support of the claim for loss of use of the vessel, as that part of the claim was itself disallowed.

Laing, K.C., in reply. It has been argued on behalf of the defendants that the giving of damages for the deprivation of the use of the vessel is a matter of discretion; but Lord Halsbury in *The Mediana* (1), when distinguishing between special and general damages, in respect of proof, lays it down clearly that general damages, for the deprivation of the user, follow as a matter of law, the circumstances determining the amount, and he relies upon the broad principle laid down by Lord Herschell in *The Greta Holme* (2), namely, "I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages in respect thereof, even though he cannot prove what has been called 'tangible pecuniary loss,' by which I understand is meant that he is a definite sum of money out of pocket owing to the wrong he has sustained."

In *The Bodlewell* (3) the vessel was working at a loss, and the decision was that there was not anything on which general damages could be given; but, in the present case, the *Heimdal*, had it not been for the collision, would have remained afloat in the dockyard ready to be commissioned in forty-eight hours for any purpose for which she might have been required.

(1) [1900] A. C. 113, at pp. 117, 118.

(2) [1897] A. C. 596, at p. 604.

(3) [1907] P. 286.

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The case of *The City of Peking* (1) is minutely examined by Lord Halsbury in *The Mediana* (2), and that learned judge shews that, in the particular circumstances of that case, damages could not be given for detention because they had already been allowed in another form.

The case of *The Rutland* (3) is overruled: see the remarks of A. L. Smith L.J. and of Collins L.J. in *The Mediana* (4) when that case was before the Court of Appeal.

BARGRAVE DEANE J. This case is really a new point grafted on old cases. I am not aware that there has ever been a case like this before in which, in a collision with a warship, a claim has been made for demurrage for that warship after the collision. However, I will deal with it on its own merits. Cases have been quoted of merchant ships which have made a claim for demurrage whilst under repairs, of dredgers which have been injured when working, and which have been allowed demurrage whilst under repairs, a lightship also, and in all those cases the vessels in question were actually employed at the time they were damaged in the several services in which they were owned, and it has been a sort of rule of late years to recognize the fact, as put by Lord Halsbury in *The Mediana* (5), that, if you improperly deprive an owner of the power to use a chattel, you must pay him damages for that wrongful deprival of the use. But in every case you have to assess damages, and the whole question is, What is the evidence on which you can assess damages? Of course it stands to reason that a warship may be employed on service and have to be replaced, in which case she comes in the same category as these other vessels. On the other hand, she may not be required, and we know now that a very large number of His Majesty's ships are laid up and are practically not in use at all. But in this particular case the *Heimdal*, the Danish man-of-war, had been on a cruise with conscripts, she had got within a few miles of Copenhagen, her inspection had taken place, the admiral was on board to witness the inspection, and she was

(1) 15 App. Cas. 438.
(2) [1900] A. C. 113, at p. 119.
(3) [1896] P. 195, n. (2).
(4) [1899] P. 127, at pp. 137, 139.
(5) [1900] A. C. 113, at p. 116.

on her way back to the dockyard at Copenhagen, where, in the ordinary course, she was to be laid up till June 1, the Danish Government having no use for her during that time. She was damaged, and there is not the least doubt that, so far as the damage is concerned, she is to be allowed the expenses of repairing the damage; but the registrar has been asked to assess a sum of money, which is put in the claim as 1500*l.*, for the loss of the use of this vessel—I do not know from when to when—during the time when she was under repair. There is nothing before the Court to shew the detail of the loss of her user, but I have just asked the registrar a question which seems to me to be necessary, and that is upon what principle he assessed the sum of 400*l.*, and he tells me that he came to the conclusion that it would have taken about thirty-two days to repair this vessel, and that by that time she might have been restored into the hands of the Danish Government in case they wanted her, and he has taken one-third of the whole time alleged, and he allowed the sum claimed for demurrage at 400*l.* That seems to me to be a very reasonable way of looking at the matter, assuming he was entitled to allow anything. But I have to ask myself, in this peculiar case, did the Danish Government lose anything by this vessel being laid up for repairs? It is said that she would, in any event, have been laid up; but the unforeseen might have happened, and I think in this class of case you should look to see what is the potential use which the Danish Government had for this vessel. Their potential use was to have her under their control to use if they wanted her; they might have wanted her for royal purposes, to conduct Royalty about from some place to another, or to receive Royalty, or for fighting purposes, or for any unforeseen purpose which you may imagine. The Government were not able to make use of her, if these things happened. I do not think I ought to wait and say "I must be satisfied that it was required." If you deprive the owner of the use of a thing, it is not necessary to shew that he would have used it, but if you put it out of the power of the owner to use it, then, according to Lord Halsbury's reasoning in *The Mediana* (1), I think you have to pay damages for that.

(1) [1900] A. C. 113, at p. 116.

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In my opinion the registrar has come to the conclusion of fact that thirty-two days were sufficient for the repair of the vessel, and, that being the case, I have got to do something different from what he has done. As I understand the evidence, it would have taken from a week to ten days to get this vessel into a seagoing condition before she would have been at the service of the Danish Government after her cruise if there had been no collision, and, therefore, if I take ten days from thirty-two, that leaves twenty-two, and I shall direct the registrar to assess such an amount as he may think represents twenty-two days' deprivation of the use of the *Heimdal*, which will be something under 400*l*.

The next item is the question of 55*l*. 10*s*. The vessel having been struck on the starboard side, a collision mat was put over the wound to take off the pressure from a longitudinal bulkhead, and that collision mat was put over the wound by means of a chain which passed down one side under the bottom and up the other, and by means of which the collision mat was hauled down from one side to the place where it was wanted. With that collision mat on she seems to have been placed in dry dock, but before the water was pumped out and she settled down on the blocks this collision mat was hauled up again, but the chain seems to have been left, and, whether it was by the hauling up of the collision mat or by the slack of the chain being left, before the vessel grounded on the blocks one of the blocks got moved and put up on end, the result of which was that when the vessel settled down on the blocks her keel plate got set up some two inches, and that caused an extra damage to the vessel—over and above that caused by the collision—of 55*l*. 10*s*. The registrar has said that that was not contemporaneous with the collision. I agree it was not contemporaneous with the collision, but I do not quite think that that is the way to look at it. I think the way to look at it is, was it so much the result of the collision that you may include it in the general damage? In my opinion it was in no way the result of the collision; it was the result of carelessness in letting the water out of the dock without first seeing that the taking up of the collision mat had or had not affected the position of the block. I do not think that you can

attach any blame to the wrong-doing ship in the collision for that damage which ensued in the dock. Therefore I think the registrar was quite right in disallowing the 55*l.* 10*s.*

The other item is a sum, I do not know what the amount is, the cost of the witnesses called on behalf of the Danish Government on these various questions. I certainly think it was right to call those witnesses for the purpose of proving what was going to be done with the vessel, and what was her service, and what was her condition, and so on, but I do not think all should be allowed; I think something should be taken off, if you can separate it—I do not know whether you can—with reference to this question of the 55*l.* 10*s.* I send it back to the registrar to settle the figures, and, subject to that, I confirm his report, or vary it, on the points which I have just mentioned. I shall leave each party to pay his own costs.

Solicitors for petitioners (plaintiffs), the King and Government of Denmark: *Stokes & Stokes, for Criddle & Criddle, Newcastle-on-Tyne.*

Solicitors for respondents (defendants), the owners of the steamship *Astrakhan*: *Thomas Cooper & Co.*

T. L. M.

C. A.
1910
March 8.

[IN THE COURT OF APPEAL.]

THE CURRAN.

Admiralty—Collision—Damage—Sound Signals.

Notwithstanding the alleged unwillingness of the Court to infer negligence from the fact that fog signals proved to have been sounded in the vicinity were not heard, failure to hear such signals may be sufficient, by itself, to justify a finding that those in charge of the vessel concerned were not keeping a good look-out.

Appeal by defendants, the owners of the steamship *Curran* and her freight, in an action of damage by collision, to vary a decision of Bargrave Deane J. pronouncing their vessel to blame as well as the steamship *Ince Bank*, owned by the plaintiffs.

The case is reported on the question of the circumstances under which inefficiency in the look-out may be inferred from the fact that whistles were not heard in a fog.

On May 30, 1909, about 10 A.M., the weather being thick fog, the wind moderate from the southward and westward, and the tide the last of the ebb of little force, the *Ince Bank*—a screw steamship, 330 feet in length, of 3372 tons gross register, and a crew of twenty-six hands, from London to Sharpness with a part cargo of lumber—was in the English Channel about fifteen miles to the southward and eastward of the Lizard on a W. by S. course, when she came into collision with the *Curran*, a steel screw steamship of 1106 tons gross register, and a crew of fourteen hands, on a voyage from Swansea to Rouen with a cargo of coal, steering a course of E.S.E. magnetic.

The facts connected with the collision sufficiently appear from the following judgment, delivered July 31, 1909, by—

Bargrave Deane J. This is an action and a cross-claim with regard to a collision between two steamers at a place which is approximately fixed at from twelve to fifteen miles to the southward and eastward of the Lizard, and it happened a little after 10 o'clock in the morning of May 30 last. The two steamers were bound, one across the channel to Rouen from the Lizard, and the other down from the north to proceed to the southward

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and westward, and the collision took place in what was, admittedly, very thick weather. The plaintiffs' steamer is much larger than the defendants' steamer; the *Ince Bank* is said to be a vessel of 3372 tons gross, whereas the *Curran* was 1106 tons gross; therefore the large vessel was very nearly three times the size of the smaller.

The question which I have to consider is chiefly one of fact, namely, as to the speeds at which these two vessels were travelling before the collision and at the time of the collision.

I have come to the conclusion that at the time of the collision neither vessel was going fast, but that each vessel was going at a low speed.

It is said on behalf of the *Curran* that she was stopped dead in the water; I do not believe that, but I do not think she was going fast. With regard to the other vessel, it is admitted that she was going from one and a half to two knots at the time of the collision; I think that probably is about right—probably the *Curran* was going a little less, perhaps one knot.

The reason why I say that the speed of the two vessels at the time of the collision was not much is the nature of the damage.

As far as I am able to judge from the nature of the damage on both these vessels, the collision was rather a collision of two vessels bumping against each other—more of a lateral movement than of a movement forward. The *Ince Bank* had her starboard side pierced by the starboard anchor which was in the hawse-pipe of the *Curran*, and, if the vessels had been going at any real speed, you would have expected that the wound would have been not a mere puncture as it was, but a wound shewing a certain amount of movement aft so as to make it more of a jagged wound, as though the anchor had been torn through it.

For the same reason, if you look at the injury on the starboard bow of the *Curran*, the injury was not exactly a grazing wound, but rather a crumpling wound, as of the plates being crushed in by the contact.

Therefore I have to consider the other aspects of the case, because my own view, and the view of the Elder Brethren who advise me, is that I ought not to find that they were going at any great speed at the time of the collision. Each vessel accuses

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the other of going at a great rate; I think each says the other was going six or seven knots. I think that is an exaggeration, and a common exaggeration in these cases, especially in the case of a fog, where the time is extremely short and the observation is generally very limited. But there are other aspects of the case with which I have to deal.

The *Ince Bank* was going down on a course of W. by S., and she says that she heard a whistle some twenty-four or twenty-five minutes before the collision, and that she immediately stopped her engines, and that at that time she was going five or six knots. That is an admission which is a very serious one, because, admittedly, she was then going five or six knots through very thick weather. That was an unpardonable rate of speed under the circumstances. She says that she stopped at once, and that she then proceeded, stopping, and a touch ahead with her engines, up to the time when she first sighted the *Curran* at a distance, I think she says, of about a ship's length, the result of which was that she was unable to stop her way, and the collision occurred. She says that she heard this whistle for twenty to twenty-five minutes. The wind was on her port side, and it is possible that, hearing the whistle as she did, may not involve that the other vessel heard it as long. But I must blame the *Ince Bank* for this, that she undoubtedly, from the history of her movements on that morning, was going too fast through this fog, and my belief is that the story she tells about the length of time at which she heard these whistles is exaggerated, and that, in point of fact, she was going a great deal too fast through the fog under the circumstances.

With regard to the *Curran* there is this to be said about her. She was going on a course of E.S.E. from four miles off the Lizard, she was bound to Rouen in France, and she says that she only heard the whistle of the *Ince Bank* once before the collision, that then she stopped her engines at once, and that the result was that, having come in sight of this vessel at a very short distance, she was stopped dead in the water. As I have said, I believe she had way on her.

I do not believe that part of her story. Why did she not hear

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the whistle of the *Ince Bank* sooner? I have said that sometimes the direction of the wind may affect sound at sea, but you will find by looking at the compass that there was not a very great difference, so far as the wind affected them, from the direction of the wind, and that if this wind affected one it might probably have affected the other. My belief is that she ought to have heard the sounds of the whistle from the *Ince Bank*, if the *Ince Bank* was whistling. I have no doubt she was whistling, because it is admitted she did whistle and was heard before she appeared in sight, and if she was whistling at all, I think it is natural to assume that her story is true that she was whistling at the proper intervals of something like a minute. Believing as I do that the *Ince Bank* was whistling, why was it that the *Curran* did not hear the whistle of the *Ince Bank* sooner than at the very short distance described? We are told that before this whistling was heard the man at the wheel was sent forward to go on the look-out, and the look-out man was sent aft to take the wheel, and I cannot help thinking that at that time there was some lapse on the part of those on board the *Curran* resulting in the look-out being defective. It is said that the chief officer of the *Curran* took the wheel whilst this exchange was being made, and that the man at the wheel went forward and relieved the look-out man before the look-out man left the forecastle head, but that does not explain why the whistle was not heard sooner.

I come to the conclusion that there was a defective look-out on the part of the *Curran*, and that that was a serious matter relating to this particular collision.

The result of this is that I find both these vessels to blame; the *Ince Bank* for going too fast in a fog, which resulted, in my opinion, from her having too much way on her and not being able to check her way altogether at the time of the collision, and that in addition she by her own evidence was navigating too fast, and too dangerously fast in what is agreed to be a thick fog, and with regard to the *Curran* she had a defective look-out.

1910. March 8. *Aspinall, K.C.*, and *Adair Roche*, for the appellants (defendants), the owners of the *Curran* and her

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freight. The learned judge in the Court below has found that the *Curran* was to blame on the ground that, from defective look-out, those in charge did not hear the whistle of the *Ince Bank* "sooner than at the very short distance described"; but the atmospheric conditions under which sounds are readily transmitted are peculiar, and the court has, therefore, hitherto been unwilling to infer negligence from the fact that a fog signal, which is proved to have been sounded in the vicinity, was not heard: see the cases collected in support of this contention in Marsden's Collisions at Sea. (1)

In *The Rosetta* (2) Sir James Hannen said: "I desire to say emphatically that it is impossible to infer from the fact that a whistle is not heard in a fog, that therefore there is an inefficient look-out on the vessel which does not hear it. It depends on other circumstances. It is not to be inferred that, because from a particular distance at which in clear weather a signal could be heard it is not heard at that distance in a fog, there is a bad look-out. I have specially consulted the Trinity Brethren on this subject. They have given me the benefit of their large knowledge and experience, and they say that what may be called the vagaries of sound in a fog are of a most astonishing character," and the learned judge proceeds to give illustrations based on the experience of the Elder Brethren and of men of the highest eminence in science.

Laing, K.C., and *John B. Aspinall*, for the respondents (plaintiffs), the owners of the *Ince Bank*, were not called upon.

LORD HALSBURY. I personally decline to assume that the learned judge was wrong in the inferences reasonably derivable from the facts proved. Our assessors concur in that view. There is nothing to my mind to shew that the learned judge was wrong.

FLETCHER MOULTON L.J. I am of the same opinion. I am conscious, as I am sure the learned judge was conscious, that there is very often eccentricity in the behaviour of fog with

(1) (1904) 5th ed., pp. 34, 35, and notes (*a*), (*b*).

(2) (1888) 6 Asp. M. C. 310, at p. 312.

regard to sound, but it would be a very serious thing if sailors entertained the idea that they would never be held liable for bad look-out if they failed to hear whistles because fogs do not carry sound with the same certainty as clear atmosphere.

In this case I think the improbability that, with a proper look-out, these sounds steadily given out from this large steamer would not have been heard by the *Curran* is so great that, unless there is a strong case to the contrary, we ought not to hold that they could not have been heard. It seems to me that the line on which the learned judge has gone is right.

FARWELL L.J. I agree.

Appeal dismissed.

Solicitors for appellants (defendants), the owners of the *Curran: Thomas Cooper & Co.*

Solicitors for respondents (plaintiffs), the owners of the *Ince Bank: Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

T. L. M.

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Dec. 14, 15, 17.

[IN THE COURT OF APPEAL.]

MOZLEY STARK *v.* MOZLEY STARK AND HITCHINS.

Divorce—Custody—Child above the Age of Sixteen—Adultery of Mother—Order against Child—Wishes of Child—Jurisdiction.

The Court has power, as between the father and mother, to order that one of the parents shall have the custody of the child during minority, but it cannot make an order against a child of sixteen years of age contrary to the child's wishes, unless the child is a ward of Court.

Thomasset v. *Thomasset*, [1894] P. 295, distinguished.

Adultery by the wife which justifies a divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle her to access to, or even to the custody of, her daughter, who is under sixteen.

APPEAL from a decision of Bargrave Deane J.

On March 27, 1906, a decree nisi was pronounced dissolving the marriage of Mr. and Mrs. Mozley Stark on the ground of the adultery of the latter with Mr. Hitchins. The decree was made absolute on October 17, 1906, and the respondent and co-respondent were married shortly afterwards. By the decree the custody of the daughter of the marriage was given to the father, and the mother was allowed occasional access to her. On December 3, 1909, the daughter, then sixteen years of age, left the school where she was residing and went to live with her mother and Mr. Hitchins. On December 13 the father moved for liberty to issue a writ of attachment against the mother for contempt of Court and for an order that the child should be restored to his custody. At the same time the mother applied for an order that the custody of the child should be transferred to her.

Bargrave Deane J. came to the conclusion that the daughter had no fault to find with her father, and that the mother had intentionally taken her away from the custody in which she had been placed by the Court; and his Lordship ordered the child to be at once delivered up to her father, committed the mother to prison for a week for contempt of Court, and ordered the costs of the application to be paid by Mr. Hitchins on the ground that he had been a party to the transaction.

Mr. and Mrs. Hitchins appealed, and the case was heard in camera.

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STARK v. STARK AND HITCHINS.

Barnard, K.C., and *Bayford*, for the appellants.
Priestley, K.C., and *Alan Macpherson*, for the father.

Cur. adv. vult.

Dec. 17. In Court, COZENS-HARDY M.R. read the judgment of the COURT (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) as follows:—

This appeal raises an important question as to the powers of the Divorce Court, and as to the mode in which those powers ought to be exercised.

The husband in 1906 obtained a decree against his wife on the ground of her adultery with the co-respondent, with substantial damages against the co-respondent. A few days after the decree was made absolute the lady was married to the co-respondent. There was only one child of the marriage, a girl who was born in September, 1893. By the decree the custody of the child was given to the father, and by consent a limited access was given to the mother. The child has been sent by the father to a school in the country, and the cost of her maintenance and education has been substantially provided for out of the damages paid by the co-respondent, which were settled upon trusts which permitted this. This fund is now reduced to about 150*l*. On December 1, 1909, the mother, in pursuance of the order giving her access, visited the daughter at her school. No suggestion or arrangement for the daughter joining her mother was then made. Later in the same day, after the mother had left, the daughter heard that her father was to be married on the 3rd, and that she was to go up to London on the next day, the 2nd. She thereupon wrote an urgent letter to her mother, saying that she should leave the train by which she was to travel at an intermediate station, and stop there penniless, and imploring her to meet her on the platform, and pointing out the difficulty in which she would be placed if her mother failed her. One can hardly be surprised that the mother acceded to the daughter's prayer and met her. If there had been any such

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arrangement between mother and daughter as Bargrave Deane J. thought, the matter would have been very different. But although the mother's conduct was technically a contempt of Court, it was not such a contempt as the Court should visit with imprisonment. This led to (1.) an application by the father to commit the mother for contempt, and (2.) an application by the mother for the custody of the child. Bargrave Deane J. committed the mother to prison for a week and refused to change the custody. From this order an appeal is presented.

Now we desire to state emphatically that the Court ought not to hesitate to send to prison one of the parties to a divorce suit who deliberately defies the Court and takes the law into her own hands. The learned judge thought that the mother was guilty of conduct of this nature. We have had the advantage of having the mother subjected to cross-examination, and of seeing the child in our private room, and we cannot regard the incident at the railway station as the result of a scheme concocted by the mother. We are satisfied that the girl had for a considerable time believed that as soon as she attained sixteen she was entitled to go where she pleased, and that she was eager to join her mother. And we are not prepared to hold that the mother was guilty of a contempt deserving of imprisonment for meeting her daughter at the station, where she might have been wholly unprotected and in grave danger unless her mother had met her. We think, therefore, that the order for committal must be discharged.

The learned judge has condemned the mother's present husband in costs; there was no evidence of any sort against him, and we fail to see any ground on which he could be ordered to pay costs. The order against him must be discharged.

The child was given up to the father immediately after Bargrave Deane J.'s order, and she is still with him. The question arises whether anything, and, if so, what, ought to be done in the matter. The child is not a party to the divorce proceedings. She is not a ward of Court. No doubt the Court of Appeal held in *Thomasset* v. *Thomasset* (1) that the Court has power inter partes to make orders respecting the custody, maintenance, and

(1) [1894] P. 295.

education of children until twenty-one. It can order the guilty parent to provide maintenance up to twenty-one. It can order, as between the father and mother, that one of the parents shall have the custody of the child during minority, but we do not think that case justifies the contention that the Court can make any order against the child. Even if the contrary view is correct, and there is a passage in Lindley L.J.'s judgment which tends in that direction, it must be observed that the learned judge added: "I do not say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes." (1) Moreover, the decision turned upon the right to order maintenance after sixteen, and not the right to order custody: see the judgment of Lopes L.J. (2)

Having seen the girl, we are satisfied that she strongly desires to live with her mother and not with her father. She has attained sixteen. She is fond of her mother's present husband, and he is willing and able to provide for her maintenance and education. The father also is desirous and able to provide for her maintenance and education.

In these circumstances we think the proper course for us to adopt is to discharge the order for custody and to leave the parties to their common law rights. If the girl is minded to leave her father's house, it is plain that the father cannot reclaim her by habeas corpus or otherwise.

We have hesitated whether it would be right to direct proper proceedings to be taken for placing the child under the protection of the Chancery Division under s. 35 of the Act of 1857 and s. 4 of the Act of 1859. There would certainly be advantages in making her a ward of Court. But having regard to the small amount of her property, which, so far as we have been informed, does not exceed 150*l.*, we do not think we ought to direct such proceedings.

We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter, assuming

(1) [1894] P. at p. 302. (2) [1894] P. at pp. 305, 306.

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her to be under sixteen. The Court ought not to lay down a hard and fast rule on this subject. The statutory power conferred upon the Court ought, in the language of Lopes L.J., "to be exercised discretionally according to the particular circumstances in each case in which its interference is invoked." (1) And it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse. The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded as a complete bar to any change or new order for access.

As to costs, the strict order would be that the mother, who was guilty of a technical contempt, ought to be ordered to pay the costs of the original motion, and on the other hand she ought to receive the costs of the appeal. Under these circumstances we think it better that no order should be made as to costs in either Court.

Appeal allowed.

Solicitors: *Alexander Pope; Hasties.*

(1) [1894] P. at p. 307.

H. C. R.

CHURCHWARD *v.* CHURCHWARD.

1910
March 21;
April 14.

Divorce—Practice — Variation of Settlement—Restraint on Anticipation — Remarriage—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3—*Jurisdiction—Remarriage after Petition but before Order.*

On a petition for variation of settlement, after decree absolute for dissolution of marriage, the Court has full power under the Matrimonial Causes Act, 1859, s. 5, as extended by the Matrimonial Causes Act, 1878, s. 3, to vary such settlement in such a way as to override the restraint upon anticipation clause and put an end to the restraint, notwithstanding the remarriage of the innocent party before an order of the Court is made, though after petition filed.

THIS was a petition for variation of a marriage settlement.

The facts of the case, so far as material, were these:

A decree nisi was granted to the petitioner (wife) on March 10, 1909, and was made absolute on September 22, 1909.

There was no issue of the marriage.

Under an ante-nuptial deed of settlement dated March 7, 1894, the petitioner's interest in the residuary estate of her father, both as to share of income during her mother's lifetime and as to share of residue on her mother's death, was held in trust, during the joint lives of the petitioner and respondent, for the petitioner for life without power of anticipation, on the death of the petitioner, if so appointed by her will, or in default of appointment, for the respondent for life, or until he married again, and on his death or second marriage, there being no children, for such persons as should be by deed or will appointed by the petitioner, and in default of appointment for the persons entitled in distribution to the personal estate of the petitioner in case of intestacy.

On November 6, 1909, the petition for variation of settlement was filed, and on November 18, 1909, the petitioner married again.

On the hearing of the petition before the registrar, the respondent was willing to consent to the order, but the trustees desired the matter to be argued before the Court.

The hearing of the petition took place on January 25 and February 19, 1910, and the report of the registrar was made on February 15, 1910.

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Bayford, for the petitioner, asked that the registrar's report be confirmed.

Shebbeare, for the trustees. The question to be decided is as to the jurisdiction of this Court. On the second marriage of the petitioner the restraint upon anticipation again attached, inasmuch as she had not dealt with the property during discoverture.

The proposed order is beyond the jurisdiction of this Court, and by the decision in *Hambrough* v. *Hambrough* (1) the trustees would not be protected if such order were made.

Before the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 39, no Court had power to remove the restraint upon anticipation in respect of the property of a married woman; or, if any Court had such power, it was the Chancery Division alone, and therefore an order in the Chancery Division is necessary to protect the trustees in this case. [He also cited *Tullett* v. *Armstrong* (2), *In re Grey's Settlements, Acason* v. *Greenwood* (3), and *Shafto* v. *Butler*. (4)].

Bayford, in reply, referred to *Benyon* v. *Benyon* (5); *Meredyth* v. *Meredyth and Leigh* (6); *Ponsonby* v. *Ponsonby*. (7)

[SIR SAMUEL EVANS, PRESIDENT, referred to *Hope* v. *Hope and Erdody* (8) and inquired as to the origin of the phrase "variation of settlements," the word "variation" not being in the Act. His Lordship added: I shall support the recommendations of the registrar if I have jurisdiction to do so.]

Cur. adv. vult.

April 14. SIR SAMUEL EVANS, PRESIDENT (after stating the facts):—The Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, as extended by the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3, confers upon this Court, in the widest terms, powers of dealing with the application of property subject to a settlement, where a dissolution of marriage is decreed.

Primâ facie the suggested limitation of the powers given by this section, by excluding altogether any interference with

(1) [1909] 2 Ch. 620.
(2) (1838) 1 Beav. 1.
(3) (1887) 34 Ch. D. 712.
(4) (1871) 40 L. J. (Ch.) 308.
(5) (1890) 15 P. D. 54.
(6) [1895] P. 92.
(7) (1884) 9 P. D. 122.
(8) (1874) 3 P. & M. 226.

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a restraint upon anticipation, would appear to be curious, anomalous, and unreasonable.

I adopt in the fullest sense, both in the letter and the spirit, the words of Gorell Barnes J. in *Blood* v. *Blood* (1), where he says, with reference to this section, "Those words are extremely wide, and I am anxious that they should not, by any construction the Court may put upon them, be narrowed in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case."

This Court in proper cases has directed a reconveyance or reassignment to innocent parties of trust property freed from the trusts of the settlement, e.g., in *A.* (otherwise *M.*) v. *M.* (2), where there was no living person, other than the guilty party, whose interests could be prejudiced; and in *Meredyth* v. *Meredyth and Leigh* (3), where the only persons, who, if they came into existence, would be affected, were the children of the petitioner; and also in *Morrissey* v. *Morrissey* (4), where the interests of unborn persons might have been adversely affected, but where the only living person who could be interested in the settlement consented.

If this Court were precluded under s. 5 from making any order with reference to the settled property which would affect or render inoperative a clause in the settlement restraining anticipation, an innocent party might be altogether prevented from making a resettlement of the property, which it might be reasonable and desirable to make, upon a second marriage. In *Michell* v. *Michell* (5) the Court of Appeal examined in detail the history of the legislation as to the powers of this Court to vary settlements under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, and the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3, and also the power to vary settlements under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, as

(1) [1902] P. 78, at p. 82.
(2) (1884) 10 P. D. 178.
(3) [1895] P. 92.
(4) [1905] P. 90.
(5) [1891] P. 208.

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extended by the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3. The decision in that case was upon the construction and effect of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 3; and the Court of Appeal decided that, in a suit for judicial separation on the refusal to obey a decree for restitution of conjugal rights, there was no power to order a settlement of property which was subject to a restraint upon anticipation clause; but throughout the judgments it was stated that the Court, in a suit for dissolution, after decree absolute, had full power to vary a settlement under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, in such a way as to override the restraint upon anticipation clause and put an end to the restraint.

I do not think that the fact of a second marriage before the order of the Court was made can possibly affect its jurisdiction and powers.

Accordingly, both in principle and in accordance with the opinions of the Lords Justices in the last cited case, I decide against the contention of the trustees upon this motion, and I confirm the registrar's report.

The trustees will have their costs out of the settled fund, to be taxed on the footing to be determined by the registrar.

Solicitors for petitioner: *Charles Russell & Co.*

Solicitors for trustees: *Harrison & Powell.*

H. D. G.

[IN THE COURT OF APPEAL.]

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March 9.

THE W. H. No. 1 AND THE KNIGHT ERRANT.

Admiralty—Collision — Damage—Tug and Tow—Negligence of Tug—Non-liability of Tow.

Those in charge of a barge, in tow of a tug, are entitled to assume that the tug will be navigated with ordinary care, caution, and maritime skill so as to keep the tow clear of danger, and, therefore, where those in charge of a tug, on entering the Mersey with a barge in tow, negligently allowed the tug, under the influence of wind and tide, to drift to leeward, so that those in charge of the barge, though making reasonable efforts by porting the helm to get to windward, failed to avoid the danger, and the barge ran into and sank a lightship, the tug was held alone to blame.

As against third parties, the legal relationship, in respect of master and servant, subsisting by virtue of contract between those in charge of tug and tow, is not material to the inquiry whether either or both tug and tow are to blame for a collision between the tow and a third vessel.

APPEAL by defendants, the owners of the hopper barge *W. H. No.* 1, in an action of damage by collision, against so much of the judgment of Sir John Bigham, President, as found them liable, with the defendants the owners of the steam tug *Knight Errant*, for the damage sustained by the plaintiffs, the owners, master, and crew of the lightship *Comet*.

On October 15, 1909, about 8 P.M., the weather being fine and clear, the wind strong from the westward, and the tide flood of about three knots, the *Comet*, a lightship, belonging to the Mersey Docks and Harbour Board, of 122 tons register, with a powerful white light flashing every ten seconds, was lying moored on her station in the Crosby Channel, at the entrance to the river Mersey, with her head to the northward and westward, when she was run into and sunk by the hopper barge *W. H. No.* 1, which was coming up the channel in tow of the tug *Knight Errant*.

The owners, master, and crew of the *Comet* sued the owners of both tow and tug, alleging that the damage was caused by the negligent navigation of the hopper barge *W. H. No.* 1 and of the tug *Knight Errant*, or alternatively by one of them.

The hopper *W. H. No.* 1, belonging to William Hill & Co.,

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dredging contractors, of Garston, Liverpool, is a steel dumb barge of 339 tons gross, and 135 feet long, with a rudder worked by a wheel from a bridge or platform aft. She has a master and four men and is used for carrying dredgings. At the material time she was being towed up the Mersey by the tug *Knight Errant* from the dumping ground outside the Bar lightship. She was steering by the white chase (stern) light on the tug, and her owners alleged that the tug was in sole control of the navigation, that a good look-out was being kept, and that the helm of the barge was kept hard-a-port after passing C. 3, green flashing buoy; but no other measure was or could be taken by those on board of her to avoid collision with the lightship.

The *Knight Errant*, belonging to J. Prendiville & Co. (managers), of New Quay, Liverpool, is a first-class screw steam tug of 148 tons gross and 14 tons net register, fitted with triple expansion engines of 99 horse power nominal working up to 700 actual. According to the defence set up by her owners she was proceeding up Crosby Channel, towards Liverpool, making six or seven knots through the water, and well on the starboard side of the channel, having the hopper barge *W. H. No.* 1 in tow with about fifty fathoms of the rope of the *W. H. No.* 1, and a wire pennant of about twenty-five fathoms. Whilst so proceeding, her helm was ported and she rounded the green flashing buoy C. 3, passing it on her starboard side distant about 25 feet and continuing well on the starboard side of the channel towards buoy C. 4, passing clear of the *Comet* at a distance of about 100 yards. It was further alleged that the collision with the *Comet* was solely occasioned by the improper navigation of those on board the *W. H. No.* 1, in that the hopper barge negligently failed to round buoy C. 3 in the course of the *Knight Errant* and, instead of so doing, was caused or allowed by those on board of her to swing out across the stern of the *Knight Errant* towards mid channel, and thereby got well out on the port quarter of the *Knight Errant*, and was observed by those on board the *Knight Errant* to be heading for the *Comet*. Thereupon the helm of the *Knight Errant* was ported, and her engines put at full speed ahead, with the object of pulling the *W. H. No.* 1 round to the southward; but the *W. H. No.* 1 failed to come round, and

when a collision between the *W. H. No.* 1 and the *Comet* was seen to be inevitable the engines of the *Knight Errant* were stopped to ease the blow.

It was further urged by counsel (*Batten, K.C.*, and *A. T. Miller*) on behalf of the owners of the *Knight Errant* that, in any event, the owners of the *W. H. No.* 1 were liable, as the relation of master and servant existed between those in charge of the tow and the persons in charge of the navigation of the tug, by virtue of a contract contained in two letters dated respectively April 17 and 21, 1909, of which the material portion ran as follows:—

From the owners of the *Knight Errant* to the owners of the *W. H. No.* 1:

"TERMS OF TOWAGE CONTRACT.

"On the hiring of the steam-tug for towage services the master and crew thereof become the servants of and identified with the ship, and are under the control of the person in charge of the ship during the performance of the contract, the steam-tug owners only undertaking to provide the motive power. The steam-tug owners are therefore not responsible for the acts or defaults of the master or crew of the steam-tug, nor for any damage or loss that may arise to the ship or cargo, nor for any damage caused by any defect in, or accident happening to, the machinery of the steam-tug, or to the towing gear or tug's hawser if in use, or from running short of coal owing to bad weather or other unforeseen circumstances, or for any loss, damage or delay, directly or indirectly, caused by, or arising from, strikes, lock-outs, labour disturbances, disputes, or anything done in contemplation or furtherance thereof whether the owners be parties thereto or not. A towage contract from sea direct to pier, river to pier, or pier to pier, is to terminate when the steam-tug has taken the ship to the river pier wall close by the entrance to the dock the ship is going into. This towage contract not to prejudice any claim the steam-tug owners may have to salvage remuneration for any extraordinary services that may be rendered to the ship or cargo from or arising out of circumstances not existing nor contemplated at the time of making the contract. If a tug is engaged to tow a ship to any port or station, but through stress of weather or other unavoidable

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circumstances she runs short of coal or is separated from the ship, the tug to be paid pro rata. The owners reserve to themselves the right of substituting one boat for another. This contract is not to apply to salvage services, nor to claims for or in the nature of salvage. . . . ."

"Referring to the writer's conversation with your Mr. Habel yesterday, we now beg to quote you the following rates for towing your dumb hopper barges from Garston Channel to the dumping ground outside the Bar and back to Garston Channel.

"For one barge £5 10 0

"For two barges towed together. . £8 5 0

"It is understood that you will guarantee a minimum of ten barges per week. . . . ."

From the owners of the hopper barge to the owners of the tug:

"We have your letter of the 17th inst. and agree to the terms stated therein, for towing our barges from Garston to the depositing ground outside the Bar lightship to the place where you have already taken our barges. . . . ."

In support of the contention that the liability rested with the barge owner, on the ground that the effect of the towage contract was to make the master of the tug cease for the time being to be the servant of the owner of the tug and become the servant of the owner of the tow, the following cases were cited:—*Bush* v. *Steinman* (1); *Laugher* v. *Pointer* (2); *Rapson* v. *Cubitt* (3); *Quarman* v. *Burnett* (4); and a passage from Beven on Negligence in Law, 3rd ed. (1908), p. 604, namely, "Another proposition involved in *Reedie* v. *London and North Western Ry. Co.* (5) is, that the rule of respondeat superior is applicable only to the immediate superior of the person who does the injury, and that there can be no more than one such responsible superior for the same subordinate at the same time and in respect of the same transaction."

The case was tried on December 14, 1909, with the assistance of two of the Elder Brethren of the Trinity House, and the following judgment was delivered by:—

(1) (1799) 1 Bos. & P. 404.
(2) (1826) 5 B. & C. 547.
(3) (1842) 9 M. & W. 710.
(4) (1840) 6 M. & W. 499.
(5) (1849) 4 Ex. 244.

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SIR JOHN BIGHAM, PRESIDENT. This was a piece of very gross negligence. I cannot imagine anything more extraordinary than the fact that the tow should be in collision with the starboard bow of the lightship, while at the same time the tug was on the other side of the lightship—whether to the S.E. or to S.W. I do not think it matters—having cleared the lightship in safety.

The question is, Who are the people who are to blame for this bungling piece of navigation? Now, it appears to me that the tug is certainly to blame. She had passed within 25 feet of buoy C. 3, she was in a proper position, and if she had taken the most ordinary precautions to maintain that position this accident would never have occurred at all. She would then, with her rope of 260 feet in length swinging between herself and the tow, have kept the tow well away from the lightship, and well in to the westward side of the channel. Instead of taking that precaution, she apparently allowed herself to be driven by the wind to the eastward until she came to a position, according to her own account, of within 100 yards of the port side of the lightship. She was then in a position of danger, that is to say, the whole adventure was in a position of danger. Instead of being where she was, she ought to have been well over to the west side of this channel which leads up the Mersey. That was, in my opinion, a fault which undoubtedly contributed to the accident.

Now with regard to the tow. The tow, according to her own account, got to a position halfway between the buoy C. 3 and the Crosby lightship, the distance, I think, being about 700 yards, before she did anything at all. I accept the evidence of the man who was in charge of the tow, when he says that the doors were not down; and I accept his evidence when he says that at the point which I have mentioned he put his helm hard-a-port. I think, and I am advised, that he might, if he had put his helm hard-a-port before he arrived at that point, have avoided the collision; and I am advised that he ought in the circumstances to have put his helm hard-a-port before he got to a position midway between buoy C. 3 and the lightship. He tells us that when he did put his helm hard-a-port the head of the tow practically failed to answer to the helm at all. He

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ought, in my opinion, to have foreseen that, and if he had foreseen that, he would probably—certainly he ought to—have put his helm hard-a-port long before he did.

These are the two causes which, in my opinion, contributed to the accident. To what extent each contributed I do not know, and I am very glad to say that I have not to inquire, but both of them contributed to the accident, and therefore I must hold that both are to blame.

Now comes the question, which is one for me, I suppose, entirely, as to what remedy the plaintiffs are entitled to.

The servants of the owners of the tow have been negligent, the servants of the owners of the tug have also been negligent, and the result of the joint negligence of the two has been to damage the property of the plaintiffs. I do not think that I have anything to do with the contract of towage which has been entered into between the two defendants. I have to decide in this case only what the rights of the plaintiffs are in the circumstances that have arisen. The defendants, both of them, owed a duty to the plaintiffs not to damage the plaintiffs' property. That duty they have both broken; they are therefore joint tortfeasors, and, as such, in my opinion, they are jointly liable for the damage that followed from their wrongful acts. I do not think there is any difficulty in law in this case. There must be judgment against both of them for the damage the plaintiffs have suffered, with costs; but no execution is to issue for the costs until I say the execution is to issue. I do not like this rule about no contribution between tortfeasors.

The defendants the owners of the tug *Knight Errant* did not appeal.

1910. March 9. *Laing, K.C.*, and *C. Robertson Dunlop*, for the appellants (defendants), owners of the hopper barge *W. H. No.* 1. There was no negligence on the part of the servants of the owners of the hopper barge; the negligence was that of the servants of the owners of the tug who were necessarily in sole control of the navigation, for the barge has no motive power of its own, being only possessed of a rudder. The

evidence is that the helm of the barge was kept hard-a-port after passing C. 3 flashing buoy, and the barge would not have fouled the lightship had the tug kept more to the westward, that is, nearer to her starboard side of the channel. The cause of the collision was that the tug neglected to keep herself and the barge well to windward, and those in charge of the barge reasonably thought that those in charge of the tug would keep to that side of the fairway which lay on their starboard hand, and if the tug had kept up to windward the hard-a-porting by the barge would have been in sufficient time.

[They were stopped by the Court.]

Aspinall, K.C., and *A. D. Bateson*, for the respondents (plaintiffs), the owners of the lightship *Comet*, and others. The wind being on the starboard side, and the tide at a slant, the tug was set to leeward in the direction of the lightship, and there were, therefore, early indications of danger. This should have been foreseen by those in charge of the hopper barge and, by the prompt action of the helm, provided against.

[FLETCHER MOULTON L.J. Is it negligence in the tow not to anticipate incompetence on the part of the tug?]

The learned judge in the Court below was advised by the Elder Brethren, who were assisting him, that the collision might have been avoided if those in charge of the tow had put the helm hard-a-port earlier than they did, so as to be on the weather quarter of the tug at the critical time. The omission to do so was negligence for which the owners of the hopper barge are liable, and, in any event, the owners of the barge are liable because under the contract of towage, which existed between the owners of the tug and the owners of the tow, the tow is liable for the negligent acts of those in charge of the tug.

Laing, K.C., in reply. The contract was between tug and tow and does not affect third parties. The question whether, as against third parties, the crew of the tug are to be regarded as the servants of the owner of the vessel in tow depends upon the circumstances of each case: *The Quickstep*. (1)

(1) 15 P. D. 196.

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THE EARL OF HALSBURY. I must say for my own part that I am compelled to differ from the learned President. I think the appeal ought to be allowed, because, to my mind, nothing can be clearer than the fact that a man is entitled to assume, given the present circumstances, that the person who in a certain larger sense has the control of the vessel being towed would be properly alive to the state of the wind and the fact that the vessel which is being towed is particularly liable to be affected by the wind. He is not called upon to assume at every point that the vessel towing him is going to be extremely negligent and do that which led to the collision. I am of opinion that he was under no such liability, and that he did what was right and proper; and although he went out of his way, perhaps, to assume that there might be danger, I think he was quite right to do what he did, and I do not think that it can be assumed, because he did not do it earlier he was guilty of negligence. It appears to me that the negligence was on the part of the towing vessel.

FLETCHER MOULTON L.J. I am of the same opinion. This is an action against two parties for the negligent navigation of two vessels. It is beyond all contest clear that the tug was negligently navigated, and I am of opinion that, for the reasons given by Lord Halsbury, there was no negligence on the part of the hopper. That is the only question raised in this case, and by allowing this appeal we decide no question of law, but only the issue of fact, that the charge of negligent navigation made against the crew of the hopper is not made out.

FARWELL L.J. I am of the same opinion, and it seems to me not only proper but absolutely necessary that the navigator on the one ship shall be entitled, and indeed bound, to assume that those in charge of the other ship which is towing him will act with good sense and seamanship. If it were not so, the difficulties and dangers would be vastly increased. On the evidence in this case it is plain that the tug could have avoided the lightship if she had taken reasonable precautions in proper time, and that the hopper put her helm hard-a-port quite as early as it was at all reasonable for her to do so.

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THE EARL OF HALSBURY. The appeal will be allowed, with costs, and there will be judgment for the defendants, the owners of the hopper, with costs.

Solicitor for plaintiffs (respondents), the owners, master, and crew of the lightship *Comet: W. Calthrop Thorne, Liverpool.*

Solicitors for defendants (appellants), the owners of the hopper barge *W. H. No. 1: Hill, Dickinson & Co., Liverpool.*

Solicitors (in the Court below) for defendants, the owners of the steam tug *Knight Errant: Miller, Son & Taylor, Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

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THE CRAIGHALL.

Admiralty—Practice—Collision—Damage — Landing-stage —" Vessel "— Preliminary Acts—Rules of the Supreme Court, 1883, *Order* XIX., *r.* 28; *Ord.* LXXII., *r.* 2; *Appendix O* (22.).

The plaintiffs, owners of a landing-stage in the river Mersey, brought an action against the defendants, owners of a steamship, to recover the amount of damage sustained by them in consequence of the steamship striking the landing-stage, and, on the application of the plaintiffs, the district registrar directed that preliminary acts should be filed. This order was affirmed by Bargrave Deane J. The defendants appealed:—

Held by the Court of Appeal, that the landing-stage was not a "vessel" within the meaning of the Rules of the Supreme Court, 1883, Order XIX., r. 28, by which preliminary acts are to be filed in actions for "damage by collision between vessels," and, therefore, the order directing the filing of these documents must be set aside, notwithstanding any wider practice with reference to preliminary acts in "causes of damage" alleged to exist under the Admiralty Court Rules of 1859, and to be saved by the provisions of Order LXXII., r. 2, for the rules of 1859 are included in the list of repealed rules in Appendix O to the Rules of the Supreme Court, 1883, and, therefore, any such alleged practice, if existing thereunder, has been abrogated.

APPEAL by defendants, owners of the steamship or vessel *Craighall*, of Glasgow, against a decision of Bargrave Deane J., affirming an order of the Liverpool district registrar directing the filing of preliminary acts in an action to recover the amount

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of damage caused by the *Craighall*, on February 15, 1910, striking the Woodside landing-stage, owned by the respondents (plaintiffs), the Mersey Docks and Harbour Board.

The case turned on the question whether the landing-stage was a "vessel" within the meaning of the Rules of the Supreme Court, 1883, Order XIX., r. 28 (1), and, if not, whether the old practice alleged to exist under the Admiralty Court Rules of 1859 in respect of the filing of preliminary acts in "causes of damage" was preserved by Order LXXII., r. 2 (2), although the rules themselves are included in the list of repealed rules in Appendix O. (3)

The Woodside landing-stage is on the Cheshire side of the river Mersey and, according to an affidavit filed by the defendants, is about 795 feet long and 80 feet broad. It consists of a cattle stage at the northern end, the southern end being a passenger stage, and the centre portion the luggage stage. "It is a permanent fixture, and is only free to move up and down with the tide, and slightly in a northerly or southerly direction due to the slack in the chains by which it is attached."

The original order for the filing of preliminary acts was made on March 14, 1910, by the Liverpool district registrar upon an application of the plaintiffs by way of summons for directions.

1910. April 18. *C. Robertson Dunlop*, for the appellants (defendants), owners of the *Craighall*. The district registrar exceeded his powers in giving directions for the filing of preliminary acts in this case, for the practice rests on Order XIX.,

(1) Rule 28: "In actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act . . . . and which shall contain a statement of the following particulars:

"(*a*) the names of the vessels which came into collision and the names of their masters;

"(*b*) . . . ."

(2) Rule 2: "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force."

(3) Appendix O: "Repeals . . . . (22.) The rules, orders, and regulations for the High Court of Admiralty of England, 1859 and 1871."

r. 28, of the Rules of the Supreme Court, 1883, and is restricted to damage by collision "between vessels." The landing-stage cannot be included under the term "vessel" in any reasonable use of the term, for it is a permanent fixture, and only differs from an ordinary pier in being so constructed as to rise and fall with the tide.

The greater part of the particulars to be inserted in the preliminary acts could not be dealt with by the parties as these particulars refer to collisions between vessels, so that no useful purpose would be served by attempting to answer a series of questions which are not applicable to the case, and there would be a want of mutuality, a point successfully raised in *The John Boyne* (1), where the action was brought by the owners of cargo against the carrying ship for the damage to the cargo sustained through a collision with another vessel.

Assuming, however, without admitting, that the old practice under the Admiralty Court Rules, 1859, gave a wider range to the actions in which preliminary acts were to be filed, because they were to be filed in "causes of damage," it cannot be contended that that practice has been preserved by Order LXXII., r. 2, as the rules of 1859 are included, without any qualification, in the list of repeals contained in Appendix O (22.) to the Rules of the Supreme Court, 1883. Any such practice, if it existed, under those rules has, therefore, been abrogated, and the statement to the contrary in note (i) on p. 368 of Williams and Bruce's Admiralty Practice, 3rd ed. (1902), is erroneous. It must also be borne in mind that at the time (1855) when preliminary acts were first introduced by rule into the practice of the Admiralty Court (see the reference to them by Dr. Lushington in *H.M.S. Inflexible* (2)), the Admiralty Court had no jurisdiction in the class of case now before the Court.

April 19. *A. D. Bateson*, for the respondents (plaintiffs), the Mersey Docks and Harbour Board. In the ordinary course preliminary acts are filed without any order, and their use is distinctly advantageous in Admiralty causes of damage because the object is thereby attained of getting a statement from the parties of the circumstances recenti facto, and of preventing the defendant

(1) (1877) 3 Asp. M. L. C. 341. (2) (1856) Swa. 32, at p. 33.

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from shaping his case to meet the case put forward by the plaintiff: see per Dr. Lushington in *The Vortigern.* (1) The point attempted to be made on behalf of the appellants, that there would be a difficulty in answering all the questions, is of no weight because the Court is not unreasonable and only requires the best answers that can be given in the circumstances of the case.

The argument that a floating landing-stage is not a "vessel" is in conflict with the wide signification attached to that word. In Johnson's Dictionary "vessel" is defined as "any vehicle in which men or goods are carried on the water," and in the Century Dictionary one of the meanings given is "a ship; a craft of any kind, usually a larger craft than a boat; but in law often construed to mean any floating structure." Both these meanings of the word "vessel" would include the landing-stage. The case, therefore, falls within Order XIX., r. 28, of the Rules of the Supreme Court, 1883, and the district registrar was right in giving directions for the filing of preliminary acts.

Assuming, however, that r. 28 does not apply, then the practice existing under the Admiralty Court Rules, 1859, may be relied on, as the provisions contained in the Supreme Court rule have not interfered with the practice prevailing in the High Court of Admiralty, before the Judicature Acts, of filing preliminary acts in other actions of damage than those referred to in the rule, that practice being still in force in the Probate, Divorce, and Admiralty Division when sitting in admiralty: see the cases cited in support of this view in the note referred to by the appellants, namely, note (i) in Williams and Bruce's Admiralty Practice, 3rd ed. p. 368, one of the cases there mentioned being that of *The Clara Killam* (2), where a preliminary act was filed by the defendants, the action being by a telegraph company against a ship for damage done to a cable. See also, on the general question, note (b) to the case of *Secretary of State for India* v. *Hewitt* in Aspinall's Maritime Law Cases. (3)

The learned judge in the Court below had also a discretion in the matter, as he could affirm the order of the district registrar

(1) (1859) Swa. 518. (2) (1870) L. R. 3 A. & E. 161.
(3) (1888) 6 Asp. M. L. C. 384.

by way of directing a preliminary act to be filed as a substitute for interrogatories framed so as to follow the same line of questions.

VAUGHAN WILLIAMS L.J. I think that this is a clear case and that the appeal succeeds. It is admitted that the rules, orders, and regulations for the High Court of Admiralty, 1859, are included in the matters referred to in the "repeal" appendix to the Rules of the Supreme Court, 1883, and in the face of that it is very difficult to see how it can be said that, notwithstanding the passing of r. 28 of Order XIX., the old rule, or the old practice corresponding with the rule, has been preserved or saved from repeal; that is, assuming that the rules of 1859, and the alleged practice thereunder, with regard to the filing of preliminary acts in "causes of damage" went beyond the case of collisions "between vessels," which, in my opinion, they did not.

Rule 28 of Order XIX. says: [The learned judge read the rule already set out, and continued.] It is said that notwithstanding that rule, which is to govern for the future the practice as to preliminary acts, a preliminary act may be ordered in a case in which there has been no collision between vessels, but only a collision between a vessel and a fixed pier or stage, which, despite the argument of counsel for the respondents, I am of opinion is not a vessel within the meaning of the words of this rule. It is attempted to be said that the application of this rule is limited because it uses the words "in actions in any Division." Counsel for the respondents has tried to argue from the words "in any Division" that this rule was not intended to apply to actions in the Admiralty Division. The Act says that the several rules, orders, and regulations contained in the schedule are repealed, and I find that Appendix O of the Rules of the Supreme Court, 1883, includes the "rules, orders, and regulations for the High Court of Admiralty of England, 1859 and 1871," which are therefore repealed. I have heard the view Cotton L.J. took in the case of *In re Busfield* (1) as to the effect of the inclusion in this repeal order of rules relating to the practice which had previously existed, and he points out that the saving clause as to

(1) (1886) 32 Ch. D. 123, at p. 131.

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practice can have no application whatsoever to a rule or order which is specifically repealed.

Under these circumstances I need not prolong my judgment, but will only say that this appeal must be allowed, because it is perfectly clear that in this respect the alleged old practice of the Admiralty Court has not been preserved or saved. I should like to add that I am confirmed as to this both by the questions which we put to counsel for the respondents and by his answers, in which he really failed to give us any instance to shew that in fact the old practice of the Admiralty Court has been preserved. As he was unable to give any examples establishing any such proposition it was my duty to ask the learned registrar of the Admiralty Division, and his answer entirely confirms the conclusion that I have come to, namely, that so far from it being possible to shew that there is any rule or practice in the Admiralty Court which has been preserved, which in fact has made the preliminary act applicable outside the cases defined by Order XIX., r. 28, no trace of it can be found in the Admiralty Registry. In these circumstances the appeal must be allowed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The rule in force with regard to preliminary acts is r. 28 of Order XIX., and that only applies to damage by collision between vessels. To my mind it is clear beyond all question that this landing-stage is not a vessel. It is a huge floating structure intended to be a permanent structure and stationary, except in one respect, namely, that, for the convenience of passengers, it has the power of rising and falling with the water. Otherwise it is absolutely fixed. It has none of the characteristics of a vessel, and, quite apart from any authority, I am of opinion that it could not possibly be included within the term "vessel." If authority were needed, there is the case of *The Gas Float Whitton No.* 2 (1), in which the House of Lords treated with scorn the suggestion that a gas buoy—which was at least as much a vessel as this landing-stage—could be regarded as a ship or vessel.

Counsel for the respondents has contended that preliminary acts may still be directed in cases which do not come within

(1) [1897] A. C. 337.

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Order XIX., r. 28. He says that under the Rules of the Admiralty Court, 1859, preliminary acts were directed in all cases of damage, that is to say, in all cases of damage within the cognizance of that Court. I do not think that the language of these rules supports his contention; but I will assume that it does so. He then refers to Order LXXII., r. 2, which says that "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force"; and he says that in the matter of preliminary acts in cases of damage other than cases of damage by collision between vessels there is no rule, and therefore the old procedure and practice remain in force —that is to say, that the Court of Admiralty can still direct preliminary acts in those cases.

In my opinion that is not the effect of Order LXXII., r. 2. I have not only my own opinion for this, but also the authority of a decision of this Court, which is binding upon us and with which I thoroughly agree. In the case of *In re Busfield* (1) this Court considered the effect of Order LXXII., r. 2, and Cotton L.J. laid down the principle that it would be wrong to say that this rule saves any practice which depends solely upon an Act of Parliament which has been repealed, or upon a rule which has been abrogated. There is no question that this earlier practice to which counsel for the respondents appeals depended solely upon the rules, orders, and regulations for the High Court of Admiralty of England, 1859, and those are specifically repealed by being inserted in Appendix O to the Rules of the Supreme Court, 1883. Therefore the decision of this Court is that a rule so repealed cannot be relied upon to keep in force a practice depending upon it. The argument of counsel for the respondents depended solely upon that, and, as it cannot be relied upon, it follows that this appeal must be allowed with costs.

FARWELL L.J. I agree. As regards Order XIX., r. 28, I think the construction is apparent. There must be two vessels in collision, and to say that a pier of this nature is a vessel appears to me to be straining words too much.

The other point taken is that the old admiralty practice

(1) 32 Ch. D. 123.

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remains. Now, there might have been an admiralty practice antecedent to the rules of 1859, in which case different considerations might arise; but in fact the whole of this practice with regard to preliminary acts depends upon the Admiralty Rules of 1855 and 1859, the rules of 1859 repealing and re-enacting those of 1855. The rules of 1859 have been in terms repealed, and Order LXXII., r. 2, which is founded on s. 21 of the Judicature Act, 1875, says that "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." The question of the effect of that rule has arisen two or three times. There is the case of *In re Busfield* (1), to which Fletcher Moulton L.J. has referred. The question also came before Kay J. in *Magnus* v. *National Bank of Scotland* (2), where the learned judge cites Lord Redesdale to shew the law as it stood long before the Consolidated Orders, 1860, and then goes on to point out that the practice had been modified by the Consolidated Orders, 1860, that the Consolidated Orders had been thereafter repealed, and that this left the old practice unaffected except so far as "other provision is made by the Acts or these rules." He, therefore, acted upon the old practice. That would have been the case here if counsel for the respondents had been able to shew that there was an admiralty practice distinct from, and not dependent upon, the orders repealed. In the case of *Tannenbaum* v. *Heath* (3) the Court held that the old practice with regard to the discovery of ship's papers in cases of marine insurance was continued, and continues to the present day, but the Court refused to extend it to any other form of insurance. It follows, in my opinion, that this particular form of admiralty practice, depending entirely upon rules which have since been repealed, no longer exists.

Appeal allowed with costs here and below.

Solicitors for appellants (defendants), the owners of the *Craighall*: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitor for respondents (plaintiffs), the Mersey Docks and Harbour Board: *W. Calthrop Thorne, Liverpool.*

(1) 32 Ch. D. 123. (2) (1888) 36 W. R. 602.
(3) [1908] 1 K. B. 1032.

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April 28, 29; *May* 6.

Admiralty — Collision — Drift-net Fishing — Incumbered by Nets — "Special Circumstances" — Lights — Standing by — Regulations for Preventing Collisions at Sea, arts. 9 (*b*) (1906), 20, 21, 26, 27—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 419, 422.

A sailing drifter and a steam drifter came into collision, at night, in the North Sea at a time when the sailing vessel, under reduced canvas owing to the heavy weather, and exhibiting the side lights for a vessel under way, was proceeding towards her fishing ground at the rate of about four knots, heading to the south-westward. The steam vessel, with her engines stopped, and moving through the water to the E.S.E. before the wind, under her mizzen, at something less than a knot, was engaged in shooting her nets, and as these nets were "partly in the water" she was exhibiting the two white lights prescribed by art. 9 (*b*) (1906) of the regulations for preventing collisions at sea in the case of vessels fishing with drift nets; but the lower of the two lights was not in the direction of the nets as required by the rule. Those in charge of her, seeing that a collision with the sailing vessel was imminent, attempted to avoid it by moving the engines astern, but, after a few revolutions, the propeller fouled the nets and the vessel became helpless. In an action of damage by collision brought by the owners of the sailing vessel against the steam vessel:—

Held, that the sailing vessel was alone to blame, as she ought to have kept out of the way, for the other vessel, though a steamer, was incumbered by her nets, and, therefore, there were "special circumstances," within the meaning of art. 27 of the regulations, rendering it not necessary for her, under art. 20, to keep out of the way of the sailing vessel. Secondly, that though the direction of the nets of the steam vessel was not properly indicated by the position of the lower of the two lights carried by her, this could not by any possibility have caused or contributed to the collision, and, therefore, she was not to blame for an infringement of the regulations under s. 419 of the Merchant Shipping Act, 1894. Thirdly, that, owing to the fouling of her propeller, the steam vessel was not in a position to render assistance to the other vessel, and, therefore, the presumption of fault raised by s. 422 of the same statute was rebutted.

Action of Damage by Collision.

The plaintiffs were the owners of the sailing drifter *Zaandam*, of Scheveningen. The defendants, and counter-claimants, were the owners of the steam drifter *Pitgaveney*, of the port of Inverness.

On October 25, 1909, about 4.40 A.M., a collision occurred

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between the *Zaandam* and the *Pitgaveney* in the North Sea, about thirty miles east of Lowestoft, under circumstances fully detailed in the judgment.

The case involved the consideration of the following articles of the regulations for preventing collisions at sea, 1897:—the preliminary article (1), art. 9 (*b*) (1906) (2), arts. 20 (3), 21 (4), 26 (5), 27 (6), and ss. 419 and 422 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). (7)

(1) "Preliminary . . . . In the following rules every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel. The words 'steam vessel' shall include any vessel propelled by machinery. A vessel is 'under way' within the meaning of these rules, when she is not at anchor, or made fast to the shore or aground."

(2) "Art. 9. . . . . (*b*) Vessels and boats, except open boats as defined in sub-division (*a*), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than fifteen feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to show all round the horizon, and to be visible at a distance of not less than three miles . . . ."

(3) Art. 20: "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

(4) Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed . . . ."

(5) Art. 26: "Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls . . . ."

(6) Art. 27: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

(7) Sect. 419: ". . . . (4.) Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

Sect. 422: "(1.) In every case of collision between two vessels, it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel crew and passengers (if any),

"(*a*) to render to the other vessel

1910. April 28, 29. *Lauriston Batten, K.C.*, and *A. E. Nelson*, for the plaintiffs, the owners of the *Zaandam*.

Aspinall, K.C., and *Hugh C. S. Dumas*, for the defendants, the owners of the *Pitgaveney*.

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The arguments of counsel fully appear from the judgment, and all the cases referred to by them are mentioned therein.

Cur. adv. vult.

May 6. SIR SAMUEL EVANS, PRESIDENT. As this case is of some general importance I thought it right to reserve my judgment, and I desire to say that, having had the assistance of two of the Elder Brethren of the Trinity House on all questions affecting navigation and manœuvres, they are entirely in accord with me in the findings I am about to state.

The question to be decided is: whether the sailing drifter *Zaandam*, or the steam drifter *Pitgaveney*, is, or whether both are, to blame for a collision which occurred between them in the North Sea on the early morning (about 4.40 A.M.) of October 25, 1909.

The facts were much in dispute. It is not necessary, or desirable, to state at length the version of the facts given by the witnesses on either side. It is sufficient to state the material facts as I find them after the necessary process of sifting and boiling down. Speaking generally, I accept the version given on behalf of the *Pitgaveney* in preference to that given on behalf of the *Zaandam*.

The material facts, as I find them upon the evidence, are as follows: The *Zaandam* is a Dutch sailing drift-net fishing vessel of sixty-nine tons gross and sixty-seven tons net register, manned by a crew of twelve hands all told. She is a wooden vessel, built about 1882. The *Pitgaveney* is a Scotch screw

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her master crew and passengers (if any) such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance . . . .

"(2.) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act neglect or default . . . ."

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steam drift-net fishing vessel of eighty-nine tons gross and twenty-nine tons net register, and manned by a crew of nine hands all told. On the morning of the collision the *Zaandam* had not begun to fish or to shoot her nets. She was under way, going towards her fishing ground, and carried the proper underway lights for a sailing vessel. The *Pitgaveney*, for about half an hour or more before the collision, had been shooting her nets and was continuing to shoot them at the time of, or immediately before, the collision. Up to the time of the collision she had shot twenty-four nets out of sixty which she intended to shoot in all. Each net was from thirty-two to thirty-four yards long. She headed E.S.E. and was travelling before the wind—which was a W. by N. strong or stiff breeze—with a little mizzen sail. Her engines had been stopped about half an hour or more before the collision happened, but she had her steam on and her engines ready, so that just immediately before the collision an order, which was given to put the engines full speed astern, could be, and was, at once obeyed. She shot her nets over the starboard bow, and after they were shot they fell and trailed astern and to windward of the steamer, so that her stem pointed away from her nets. She carried the two white lights prescribed by art. 9 (*b*) of the regulations for preventing collisions (May 1, 1906) for vessels fishing with drift nets, with a working light. The lights, however, at the time of the collision were not carried in the direction prescribed by that article—that is to say, the lower of the two lights was away from, and not in the direction of, her nets.

The two vessels sighted each other when a mile or a mile and a half distant; the *Zaandam* was then sailing on a S.W. course, and the *Pitgaveney* was making an E.S.E. course. I find that from this time until the collision happened the speed of the *Zaandam* was about four knots, and that of the *Pitgaveney* about one knot. The accounts of the speed and of the operations of the *Pitgaveney* can be seen to coincide in a remarkable way, none the less significant because this was not pointed out by the witnesses. The engines were stopped about 4 A.M. The shooting of the nets then began, and proceeded till just before the collision happened, say about 4.40. This is the time midway between

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those stated by the two vessels. The twenty-four nets at thirty-four yards each would make 816 yards—close on half a mile. It is almost certain, therefore, that the speed of the *Pitgaveney* was rather less than one knot. The evidence for the *Zaandam* that the *Pitgaveney* steamed towards her a good three knots is quite unreliable. The *Zaandam* was steered by an A.B. He stated that he changed her course from S.W. to S. just after the *Pitgaveney* was sighted, on the ground that he thought the *Pitgaveney* was a fishing vessel; but I think her course, which was not recorded or very accurately observed, was nearer to the S.W. until the very time of the collision. She carried a working mainsail with one reef, a foresail with one reef, a mizzen with two reefs, and a small jib. For some time before the collision she kept her course and speed. In the collision the starboard side of the *Zaandam*, about amidships, and the stem of the *Pitgaveney* came into violent contact. The damage was chiefly caused to the *Zaandam*, and was serious. The damage caused was consistent with the description of the casualty which was given on behalf of the *Pitgaveney*. Immediately before the collision happened the master of the *Pitgaveney*, in order to try to avoid it, seeing that the *Zaandam* was keeping her course, ordered his engines full speed astern, but after a few revolutions the propeller became fouled with the warp of the nets and was absolutely stopped. The warp parted, and the part which had become entangled in the propeller was produced in Court. The result was that the twenty-four nets which had up to that time been shot were cut off and for the time being were lost. The propeller was not freed for several hours afterwards. About 10 A.M. the other thirty-six nets were shot and buoyed; the vessel then went off in search of the twenty-four nets which had been lost, and after some little time they were recovered. After the collision the *Zaandam* proceeded on her course and kept her speed, and she reached the port of Maasluis, some fifty-five miles away, in due course. Seeing that she was damaged, those on board her shortly after the collision burnt flares. The *Pitgaveney* did not stand by, or give any answer to the *Zaandam's* flares.

Various points were raised on either side and relied upon as

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shewing blame on the part of the respective vessels. It was contended by counsel for the *Zaandam* that the *Pitgaveney*, although, when first sighted, heading W., with her lower light to the westward, as if she were fishing with her nets to windward, turned right round and steamed in an E.S.E. direction at some speed, up to the collision. As indicated above, I cannot accept the accuracy of this version. It was admitted on behalf of the *Zaandam* that if the *Pitgaveney* was shooting her nets, as I find she was, this manœuvre of turning round would have been impossible. Upon the account thus put forward by the *Zaandam*, that the *Pitgaveney* turned round and steamed towards her, it was contended that the *Pitgaveney* was a "steam vessel under way" within the meaning of the preliminary note to the regulations for preventing collisions, and that she should have carried the under-way lights for a steam vessel in accordance with art. 2. It was also contended that she was carrying the wrong lights, inasmuch as she was not stationary. It was further contended that she was not entitled to carry the lights prescribed by art. 9 (*b*); and that in any event she was carrying such lights in the wrong direction, in breach of the provisions of the article. It was, moreover, contended that she was a steam vessel, and that as such she ought to keep out of the way of a sailing vessel under art. 20, and by inference under art. 26; and that the *Zaandam* was entitled to, and indeed was bound to, keep her course and speed by reason of art. 21, and that in any event the *Pitgaveney* did not act in a seamanlike manner, because she did not put her engines full speed astern in time. It was finally argued that the *Pitgaveney* refused to stand by when the flares were shewn from the *Zaandam*, and was therefore acting in contravention of s. 422 of the Merchant Shipping Act, 1894, and that accordingly she must be presumed to be to blame for the collision.

Counsel on behalf of the *Pitgaveney*, on the other hand, contended that there was no proper look-out on the *Zaandam*; that the *Pitgaveney* was to be considered and treated as a "sailing vessel" and not as a "steam vessel" within the meaning of the preliminary note to the regulations, because although "under steam," she could not, in the circumstances, work her propeller

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by steam; that she was, therefore, a "sailing vessel" under art. 26, and that, as she was fishing with nets, the *Zaandam* ought to have kept out of her way under that article. Alternatively, it was contended that, if the *Pitgaveney* was to be considered as a "steam vessel," she was not a steamer "proceeding" under art. 20, in the first place because she was not in fact "proceeding under steam," or by means of her steam propelling power; and in the second place because she was not "proceeding" by reason of special circumstances within the meaning of art. 20 and the decisions in *The Tweedsdale* (1) and *The Gladys*. (2) Finally it was contended that the *Pitgaveney* was not "fishing" under art. 9 (*b*); that there was no provision for her lights when shooting her drift nets, this being a casus omissus not dealt with by the article; and that accordingly she was entitled to carry the white lights she did, and in the direction in which she carried them, in accordance with the practice of drift-net fishing vessels; and, alternatively, that if she was within art. 9 (*b*) she carried the proper lights, and although the direction of the two lights was reversed and might be wrong and constitute a breach of the article, the breach did not, and could not by any possibility, cause or contribute to the collision.

The points thus raised are of considerable importance, especially to those engaged in the business of fishing with drift nets, and therefore also to all those who may navigate in waters where such fishing takes place.

The construction and application of the various rules are not easy. Giving the best consideration I can to the rules and to the various decisions upon them, the conclusions at which I have arrived upon the various points raised are as follows. The *Pitgaveney* was a "steam vessel," and not a "sailing vessel" fishing with nets within the meaning of art. 26. She was a "steam vessel under steam" notwithstanding that she might not, without fouling it, work her propeller by steam. If she was "proceeding" under art. 20, she would have been a "steam vessel proceeding," although she did not in fact proceed by means of her steam power. She was a "steam vessel under way" within the preliminary note to the regulations, and would have

(1) (1889) 14 P. D. 164. (2) [1910] P. 13.

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had to carry the "under-way lights" if art. 9 did not apply to her case. She was a vessel fishing with drift nets, having her nets partly in the water, within the meaning of art. 9 (*b*), although she was only shooting her nets preparatory to fishing in the ordinary sense of the term, and therefore she was excused by art. 9 from carrying "under-way lights" and was entitled to, and bound to, carry the lights prescribed by art. 9 (*b*): see *The Cockatrice*. (1) She was unable, while shooting her nets, to use her steam either to go forward or astern without the risk, amounting almost to the certainty, of immediately fouling her propeller. She was, therefore, an "incumbered" vessel, and although she was a steamer, and therefore prima facie bound to give way to a sailing vessel, yet as an incumbered vessel, even though she was making a speed under wind, with a small sail, of about one knot, she was either not a vessel "proceeding" under art. 20, or, if she was, she was relieved from the obligation and put outside the operation of art. 20 by reason of art. 27: see *The Tweedsdale* (2), *The King's County* (3), *The Upton Castle* (4), and *The Gladys*. (5) She should have carried, as I have said, the fishing lights described in art. 9 (*b*). She did carry these lights, but at the time of the collision the two lights were not in the direction prescribed by that article. Her lower light, instead of being in the direction of the nets, was in the opposite direction. She therefore failed to observe in this respect the provisions of the article, and was in this sense guilty of a breach of the rules and came within the operation of s. 419 of the Merchant Shipping Act, 1894.

It was given in evidence that steam drift-net vessels, while shooting, head away from the nets, and shoot them over the side to trail towards the stern, and that, after the operation of shooting the nets is over, they turn round, head to the nets, and then drift. In these circumstances I think that the lights should be so placed that the lower light should always be in the direction of the nets—i.e., in the circumstances above stated, the lower light should have been towards the stern while the shooting took

(1) [1908] P. 182.
(2) 14 P. D. 164.
(3) (1904) 20 Times L. R. 202.
(4) [1906] P. 147.
(5) [1910] P. 13.

place, and when that operation was over, and the vessel was turned head to the nets, the lights should have been changed, so that the lower light should be towards the stem, and in the direction of the nets.

I therefore am of opinion that the *Pitgaveney* did not comply with the provisions of art. 9 (*b*) with reference to the direction of the lights. If, by reason of this non-compliance, damage were caused by any vessel passing on the wrong side of her and fouling her nets, she (the *Pitgaveney*) would be to blame.

It remains, however, in the present case to be considered whether her non-compliance with art. 9 (*b*) could by any possibility have caused or contributed to the collision. It clearly did not in fact cause or contribute to the collision, but that is not the material question, and, indeed, upon such a question proof would not be admissible. See *The Fanny M. Carvill* (1) and *The Duke of Buccleuch.* (2) Although it is very difficult to distinguish between evidence directed to the question of whether a breach in fact caused or contributed to the collision and evidence directed to the proper question of whether a breach could by any possibility have caused or contributed to the collision in the circumstances of the case (see the judgment of Vaughan Williams L.J. in *The Corinthian* (3)), I am satisfied by the evidence and the arguments for the *Pitgaveney* that the non-compliance with the regulations as to the direction of the lights under art. 9 (*b*) could not by any possibility have caused or contributed to the collision. The lights she carried were those of a vessel fishing with drift nets. They were so regarded by those responsible for the *Zaandam* when the *Pitgaveney* was first sighted. She therefore ought to have been regarded as an incumbered fishing vessel, whether the lower light pointed one way or the other. The *Zaandam*, however, regarded her as a vessel steaming towards the *Zaandam*, although she was not in fact steaming; and the *Zaandam* proceeded on her course on the ground that she regarded the *Pitgaveney* as a steamer steaming under way, although, as I have said, she was not steaming, and did not carry the under-way lights. This, in my opinion, was

(1) (1875) 13 App. Cas. 455, n. (2) [1891] A. C. 310.
(3) [1909] P. 260, at p. 275.

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due to the fact that the *Zaandam* kept no look-out or a very bad look-out. Compare *The Englishman* (1), *The Argo* (2), and *The Gannet.* (3)

As to the alleged breach by the *Pitgaveney* of s. 422 of the Merchant Shipping Act, 1894, I find that in her attempt to avoid the collision, when she saw the *Zaandam* determinedly keeping her course, the *Pitgaveney* put her engines full speed astern and fouled her propeller, as was inevitable. The fact that she risked this shews her anxiety to do what she could to prevent the accident. This rendered her unable to give assistance by steaming, and I find also on the evidence, and am advised by the Elder Brethren, that in the circumstances, and in the sea that was making, it would have been dangerous for her to lower her boats, even if the *Zaandam* had not gone away on her speed. Accordingly I am of opinion that the *Pitgaveney* has rebutted the presumption raised by s. 422 of the Merchant Shipping Act.

In the result, therefore, I hold that, as the *Pitgaveney* could not manœuvre under steam either forward or astern, by reason of her nets, without fouling her propeller, she was not bound by art. 20 to keep out of the way; that there were "special circumstances" within art. 27 which authorized a departure from art. 20, supposing art. 20 otherwise applied; that she was a vessel fishing with drift nets, with the nets partly in the water; that she carried the lights of a fishing vessel, although the direction did not properly indicate the line of the nets; that the lights being those appropriate for a fishing vessel, the mistake in the direction could not by any possibility cause or contribute to the collision; that the *Zaandam* did not keep a proper look-out; that she wrongly kept her course; that she could without difficulty, with the steerage way upon her, have put her helm hard up shortly before the collision, and eased off so as to keep away from the *Pitgaveney;* that she ought to have done so; and that she is solely to blame for the collision.

I therefore give judgment in favour of the defendants upon the claim and counter-claim, with costs, and order the usual

(1) (1877) 3 P. D. 18. (2) (1900) 9 Asp. M. L. C. 74.
(3) [1899] P. 230.

reference to ascertain the amount of the damage under the counter-claim. 1910

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Solicitors for plaintiffs, the owners of the *Zaandam: Stanton & Hudson, for A. M. Jackson & Co., Hull.*

Solicitors for defendants, the owners of the *Pitgaveney: Pritchard & Sons.*

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1910

March 11, 12.

Admiralty—Ship—Collision—Sound Signals—Helm Movement to counteract Effect of reversing Engines—Regulations for Preventing Collisions at Sea, 1897, *art.* 28.

By art. 28 of the regulations for preventing collisions at sea, a steam vessel under way, in taking any course authorized or required by the rules in respect of another vessel in sight, shall indicate that course by the appropriate sound signal:—

Held, that a steam vessel having sounded three short blasts to indicate that "my engines are going full speed astern" did not infringe the rule by omitting to sound one short blast on hard-a-porting, as this helm action was to prevent her head canting to starboard under the reverse action of the engines.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the *Holmwood*, and her master and crew proceeding for their lost effects. The defendants and counter-claimants were the owners of the *Aberdonian*.

On January 5, 1910, about 2 P.M., the weather being fine, the wind south-westerly light, and the tide flood of from one to two knots, the *Holmwood*—a steel screw steamship of 1327 tons gross register, engines of 159 horse power nominal, and a crew of seventeen hands, from Dunston to London with coal—was in the North Sea off Orfordness, steering a course of S.W. $\frac{1}{2}$ S. magnetic, and making from seven to eight knots, when she came into collision with the *Aberdonian*, a steel screw steamship of 1647 tons gross register, engines of 395 horse power nominal, and a crew of forty hands, from London to Aberdeen with general cargo and passengers, steering a course of N.E. $\frac{3}{4}$ N. magnetic, and making about twelve knots.

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The case was tried on March 11 and 12, 1910, when the learned judge was assisted by two of the Elder Brethren of the Trinity House.

The facts relating to the collision are fully detailed in the judgment, and the case is reported on the question whether art. 28 of the regulations for preventing collisions at sea, 1897, has any application to the case of a steam vessel not sounding one short blast on hard-a-porting the helm to counteract the effect on her head of reversing the engines. (1)

Aspinall, K.C., and *A. D. Bateson*, for the plaintiffs, the owners of the *Holmwood* and others.

Laing, K.C., and *Lewis Noad*, for the defendants, the owners of the *Aberdonian*.

Counsel for the plaintiffs referred to *The Corinthian* (2); counsel for the defendants to *The Mourne*. (3)

BARGRAVE DEANE J. In this case a collision took place in the afternoon, at about 2 o'clock, on January 5 in this year, between the steamship *Aberdonian*, bound from London to Aberdeen with cargo and passengers, and the *Holmwood*, a steamship bound from the Tyne to London with coal. Each accuses the other of being in fault for the collision. The case is one entirely of fact. There may be a question of law involved, but the main question is one of fact.

The two vessels were bound on almost exactly opposite courses. The *Holmwood* was on a S.W. $\frac{1}{2}$ S. course, and the *Aberdonian* was on a N.E. $\frac{3}{4}$ N. course. When sighted, according to the *Holmwood*, the *Aberdonian* was right ahead, with her masts and funnel in line, shewing both bows, and according to the *Aberdonian* the *Holmwood*, when sighted, was a little on the starboard bow. The speeds of the two vessels at that time were—the *Aberdonian* twelve knots and the *Holmwood* seven to eight. That

(1) Art. 28: " . . . . When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

" One short blast to mean 'I am directing my course to starboard.'

. . . .

" Three short blasts to mean 'My engines are going full speed astern.'"

(2) [1909] P. 260.

(3) [1901] P. 68.

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gives a joint speed of about a mile in three minutes. The distances that they were seen apart are according to the *Holmwood* a mile, and according to the *Aberdonian* three-quarters of a mile. There has been some suggestion made, chiefly on behalf of the *Aberdonian*, that the weather was misty, but I think from the whole of the evidence that it is quite clear that the weather was such that these vessels were justified, both of them, in going at their full speed as they were doing.

There is a dispute as to what sound signals were given and heard. The wind was S.W. and, although a light breeze, favourable to sound signals being heard by the *Holmwood* more readily than by the *Aberdonian*; but I do not think there was anything in the wind really to interfere with the hearing of sound signals if properly given and listened for.

The story of the *Holmwood* is that on sighting a vessel a mile off the officer on the watch took out his glasses from his pocket and satisfied himself that the vessel was right ahead, with her funnel and masts in line, coming straight for him. He thereupon, in accordance with art. 18, ported his helm, and, he said, blew one blast of his whistle. The *Aberdonian* never seems to have heard that one blast. She says she never heard a single blast from the *Holmwood*. Undoubtedly, according to the *Holmwood's* evidence, she blew first. Now, was that porting on the part of the *Holmwood* observed by the officer of the watch on the *Aberdonian*? His evidence is peculiar. He says: "I noticed this vessel. She was sheering slightly, sometimes to starboard, and sometimes to port, and she was about a point on our starboard bow. I blew two blasts and starboarded for her." Why did he do that? It was contrary to art. 18. It is not that he said he heard a signal of two blasts from her. He heard nothing from her, and starboarded for a vessel very nearly ahead of him. He ought to have ported. He says he gave two blasts and that the other vessel responded with a two-blast signal. Now that is denied by the *Holmwood*. The *Holmwood's* story is that, having ported, she steadied; that she was then on the port bow of the *Aberdonian*; that then, in response to her one-blast signal, the *Aberdonian* starboarded; and that, seeing the *Aberdonian* was starboarding into her, the *Holmwood* blew three blasts and

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reversed, and at the same time put her helm hard-a-port—as the officer on the watch, who had been in the ship for some time, says, in order to prevent her going to starboard—not, he says, to send her to starboard, but to check the reverse action of the engines. He knew his ship, and I suppose the action of the propeller going astern varies in different ships. Still, in this case, the man has told us that he did not put his helm hard-a-port to send her head off to starboard, but for another reason. In spite of that the *Aberdonian* came on, and there was a very serious collision. I believe about a minute before the collision the *Aberdonian's* engines were ordered to be put full speed astern, but in the opinion of the Court that did not seriously reduce her speed, and this vessel, going at a very considerable speed, not less than about nine knots—she says only six—ran into the port side of the *Holmwood*, abaft the bridge, and sank her. Fortunately no lives were lost.

First of all, is there any blame I can attach to the *Holmwood*? She was right in porting. Did she blow a single blast? I believe she did. She then steadied, having brought the other vessel on her port bow, and she says, "We were then port to port, and if the *Aberdonian* had kept her course we should have passed port to port; but when I saw the *Aberdonian* starboarding into me there was nothing more for me to do but reverse, which I did; and I did not blow one blast when I ported my helm, because I did not intend my head to go to starboard." It is said the *Holmwood* was to blame for not blowing another blast after blowing three, because she put her helm to port. It is said she ought to have blown "3 and 1," but I think it would be very confusing if this vessel had blown three short blasts and then one short blast. That is a signal known in the Thames for a vessel turning round, but what would it have meant to a vessel in the open sea? I do not think it is a signal which, in the circumstances, would have conveyed much to the *Aberdonian*; but even if the *Holmwood* had blown a single blast, in my opinion, at that time there was no possibility of the *Aberdonian* doing anything. She had been committed to her starboard helm and she put her helm hard-a-starboard at the last moment, although she did not blow the extra two blasts when

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she put her helm hard-a-starboard. She ought to have blown "3 and 2" if the defendants' contention is right, and that would have been very confusing to the *Holmwood*. In my opinion the *Holmwood* was not to blame for any action she took, or for the omission to blow that one blast at the last moment to indicate that she was directing her course to starboard, when in fact she was not, according to her evidence, doing anything of the sort. The *Aberdonian* says this: "I never heard one blast from the *Holmwood*. I heard two, and that was after I blew two." The fact is that the *Aberdonian* did not hear the single blast before, and when she blew two the *Holmwood* blew three, which was misheard on the *Aberdonian* and was supposed to be two. She heard nothing more except that signal.

Now I think that the *Aberdonian* was to blame, first of all for starboarding instead of porting under art. 18. But apart from the article, the evidence of the chief officer of the *Aberdonian*, who was in charge on the bridge, was this. He said: "I saw this vessel being badly steered, and I starboarded. Notwithstanding that in answer to my two-blast signal she blew two, I saw that she was directing her course, not to port but to starboard, which indicated that she was under port helm. I saw that instead of broadening on my bow she was narrowing"; but, notwithstanding that, he persisted in his course of starboarding, and he did not reverse till too late, at a time so late that it was impossible to take the speed off the vessel to any serious extent. I think the engine-room people say the engines were actually going astern only some half-minute before the collision. In my opinion the conduct of the *Aberdonian* was not justified. A vessel going at great speed at the time in question should have reversed sooner and should not have starboarded in the way she did. For these reasons I am of opinion that the *Holmwood* is not to blame, and that the *Aberdonian* is alone to blame.

Solicitors for plaintiffs, owners of the *Holmwood* and others: *Thomas Cooper & Co.*

Solicitors for defendants, owners of the *Aberdonian*: *William A. Crump & Son.*

T. L. M.

1910

May 9.

JACKSON *v.* JACKSON.

Divorce—Hearing—Suspicion as to Truth of Petitioner's Evidence—Adjournment—Papers sent to King's Proctor—Right of King's Proctor to intervene or to shew Cause before Decree Nisi—Practice.

At the hearing of a petition by the wife for dissolution of marriage, her counsel, in opening, and the petitioner, in the witness-box, stated that she had committed adultery, but asked the Court to exercise its discretion in her favour; but the Court, having a very strong suspicion that the petitioner's case was in material respects untrue, adjourned the further hearing, at the same time directing that all necessary papers in the matter should be sent to His Majesty's Proctor, in order that, under the directions of the Attorney-General, the said Proctor should instruct counsel to argue before the Court all questions in relation to the cause which the Court might deem it expedient to have fully argued, and, for that purpose, to take such steps as might be deemed necessary or expedient.

Upon motion by the King's Proctor for directions :—

Held that, as the Court could not compel the Attorney-General to issue his fiat, the case would have to remain in the reserve list until that list should be called over and dealt with in the ordinary course.

Hudson v. *Hudson and Poole*, (1875) 1 P. D. 65, questioned.

This was a motion, on behalf of the King's Proctor, for directions under the following circumstances.

The wife filed her petition for divorce on February 20, 1909, and the case came on for hearing as an undefended cause on June 11, 1909.

The petitioner then admitted adultery with one S., but stated that it was committed by her at the instigation of the respondent, and that the man S. had since been intimidating her, but that she herself had not communicated with him since a date which she named.

The man S. was in Court and interrupted the proceedings, saying that the petitioner's statements, so far as the alleged intimidation and date of the last communication with him, were untrue.

The case then stood over to allow S. to shew cause why he should not be committed for contempt of court, and at the adjourned hearing, on June 14, 1909, counsel on his behalf

produced certain letters and read extracts from some of them, shewing that his interruption of the proceedings was not wholly unjustified and that the petitioner's statements which he had challenged were untrue.

The learned judge (Bargrave Deane J.) thereupon made the following order :—

"The judge, having taken the oral evidence of the petitioner and of the witnesses produced on her behalf in support of the petition filed in this cause, adjourned the further hearing and directed all necessary papers in the matter to be sent to His Majesty's Proctor in order that under the directions of the Attorney-General the said Proctor should instruct counsel to argue before the Court all questions in relation to this cause which the Court deems it expedient to have fully argued, and for such purpose to take such steps as the Attorney-General may deem necessary or expedient."

The King's Proctor having made inquiries and submitted certain evidence, bearing on the question of the petitioner's adultery, to the Attorney-General, the latter directed that counsel should be instructed to appear before the Court at the adjourned hearing, for the purpose of arguing any question which the Court might deem it necessary or expedient to have fully argued; and the Attorney-General added: "I do not direct the King's Proctor to take any further steps by way of calling evidence, or otherwise, at this stage of the case."

Thereafter the King's Proctor communicated with the London agents of the solicitor who had acted for the petitioner at the time of the hearing, and in due course learnt that the solicitor was no longer acting for the petitioner.

The petitioner's address was then ascertained and she was personally served with notice of motion.

Willock, for the King's Proctor, asked for directions. The King's Proctor is not a party and he cannot, therefore, bring the case on. The petitioner has written to say that she has abandoned her petition. The evidence obtained by the King's Proctor would not prove collusion, and this is the only ground upon which the King's Proctor can intervene before decree nisi.

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In the course which he has taken in not directing an intervention the Attorney-General considers himself bound by the decision in *Hudson* v. *Hudson and Poole*. (1)

BARGRAVE DEANE J. I have read the papers and I remember the case. The Court had a very strong suspicion that the petitioner's case was, in material respects, an untrue one. I therefore directed that the papers should be sent to the King's Proctor. The ex-President (Lord Mersey) and I had occasion to look at the Act of Parliament, and we both came to the conclusion that it did enable the King's Proctor to come in and if necessary to call evidence. The Attorney-General does not agree with that view. He thinks that the Act does not give the King's Proctor power to intervene before decree nisi, except upon the ground of collusion. I cannot compel the Attorney-General to issue his fiat for the King's Proctor to intervene, but I absolutely decline to pronounce a decree nisi upon the evidence before me last June.

The case being in the reserve list, I direct that it be called on in the usual course when that list is called over next Michaelmas sittings. If no one appears, the case will then be struck out.

(1) 1 P. D. 65.

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1910
April 30;
May 2.

KEMP-WELCH *v.* KEMP-WELCH AND CRYMES.

Divorce—Practice—Wife's Costs—Stay of Proceedings until Payment—Husband's Petition—Jury discharged without Verdict—Proposed Retrial—Jurisdiction—Divorce Court Rule 158.

At the trial of a petition by a husband for divorce, the jury disagreed and were discharged without giving a verdict. Before and during the hearing the wife had obtained the usual orders for security for her costs of the trial, and a sum of 45*l.* had been paid into Court. The husband now proposed to have the petition retried, though he had not paid the balance of the wife's taxed costs not covered by the 45*l.* in Court:—

Held, that there was jurisdiction to stay all further proceedings by the husband until the whole of the wife's taxed costs had been paid or secured, and security given for the wife's further costs of the retrial.

Joseph v. *Joseph*, (1897) 76 L. T. 236, approved.

APPEAL from Bargrave Deane J. in chambers, which raised the question whether a husband who had been ordered to pay his wife's costs in a previous trial could proceed to have his petition reheard until he had complied with this order. The material facts were as follows:—

In November and December, 1909, a petition by a wife for a judicial separation on the ground of cruelty, and a petition by the husband for divorce on the ground of his wife's adultery, were tried before Bargrave Deane J. and a special jury. After a hearing which lasted seven days, the jury found that the husband had not been guilty of cruelty, but were unable to agree upon their verdict on the issue raised in the husband's petition, and by an order of December 9, 1909, the judge dismissed the wife's petition for judicial separation and discharged the jury from giving a verdict on the issue raised in the husband's petition. The order then went on to direct the husband to pay to the wife her costs of the husband's petition and the taxed costs of her own petition.

Before the hearing of the consolidated suits the wife had obtained under r. 158 the usual order for security for her costs of the trial, under which 45*l.* was paid into Court, and during

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the trial she applied for and obtained the usual order for further security.

The wife's taxed costs were allowed at 296*l.*, of which, after deducting the 45*l.* in Court, 251*l.* remained unpaid.

On March 18, the husband was ordered to pay the balance within seven days.

The husband having caused his petition to be set down again for retrial with a common jury, the wife, on March 31, applied to the registrar for an order that all further proceedings in the cause should be stayed until the order of March 18 for payment of costs had been complied with and security given for the wife's further costs of the trial.

The registrar made the order in the terms asked.

Bargrave Deane J. varied the registrar's order by striking out the words referring to the costs ordered to be paid by the order of March 18, stating that he did so as he doubted his jurisdiction to make such an order as was asked for, but gave leave to appeal.

The wife appealed.

M. Shearman, K.C., and *Bayford*, for the appellant. The wife in applying under r. 158 for security for costs under which the 45*l.* was paid into Court, and in applying again during the hearing for further security, has followed the usual practice. The husband in these cases is bound to furnish his wife with the means of defending herself. That there is jurisdiction to stay further proceedings until the taxed costs have been paid by the petitioner seems clear from *Keane* v. *Keane*. (1) The jury disagreed on the issue of adultery and were discharged. The wife's costs, therefore, are not to be limited to the amount paid into Court: *Hurley* v. *Hurley and Menzies* (2), where the practice is very clearly stated.

Barnard, K.C., and *W. O. Willis*, for the respondent, the husband. The husband is without means, and if he is not to be allowed to retry his petition until the costs of the first hearing are paid, he will be absolutely prevented from obtaining the relief he believes himself to be entitled to. *Keane* v. *Keane* (1) has

(1) (1873) L. R. 3 P. & M. 52. (2) [1891] P. 367.

no bearing on the present case; that was a suit for restitution of conjugal rights and under the practice of the old Ecclesiastical Courts. That practice is not made applicable by s. 22 of the Matrimonial Causes Act, 1857, to proceedings for divorce such as the present.

An order, such as this, staying proceedings till costs are paid is not the right method of enforcing payment. The order of March 18 could have been enforced in the manner pointed out by s. 52 of the Matrimonial Causes Act, 1857, and by r. 179: *Ivimey* v. *Ivimey*. (1) The respondent is unable to pay, and mere non-payment on the ground of poverty is not enough to warrant a stay of proceedings under s. 24, sub-s. 5, of the Judicature Act, 1873.

[COZENS-HARDY M.R. referred to *Joseph* v. *Joseph*. (2)]

That case does not appear to have been argued and, further, is not binding upon this Court.

The respondent desires a fresh trial, and for this security will have to be given in the usual way, and if security is given the respondent ought not to be debarred from having this petition reheard, simply because he is unable to pay the costs of the first hearing.

Bargrave Deane J. had a discretion; he had heard the first trial, and he has refused to stay proceedings in the second trial until after payment of the costs of the first hearing. This discretion ought not to be interfered with.

Shearman, K.C., in reply. Rule 158 in effect extends the practice of the old Ecclesiastical Courts as to costs to suits for dissolution like the present. As the jury have not found the wife guilty of misconduct, the petitioner ought not to be allowed to enter upon further litigation until provision has been made for the costs already incurred: *Morphett* v. *Morphett*. (3)

COZENS-HARDY M.R. If the Divorce Court treats a wife in some respects worse than a husband, it undoubtedly treats a husband in a very important matter worse than a wife, inasmuch

(1) [1908] 2 K. B. 260, 264. (2) 76 L. T. 236.
(3) (1869) L. R. 1 P. & M. 702, 706.

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Cozens-Hardy M.R.

as it always requires a husband to provide his wife with the sinews of war to defend herself.

I do not think that the principle upon which this exception from all other litigious cases is based is more clearly or better stated than by the Court of Appeal in the case of *Robertson* v. *Robertson*. (1) There the husband petitioned for a divorce from his wife on the ground of adultery; it was, as in this case, a case not under the old ecclesiastical jurisdiction. It was tried before a jury, and the wife was found guilty of adultery. An order had been made, in accordance with the practice of the Divorce Court under the rule which I shall call attention to hereafter, for payment of a certain sum for costs or security to the amount of 370*l*. Her costs were taxed at 680*l*., and Sir James Hannen, in accordance with what, up to that date, had been the practice of the Court, took the view that the wife's costs must be allowed to the amount for which security had been given. That came before the Court of Appeal, and Sir G. Jessel, then Master of the Rolls, says (2): "The practice seems to be to require the husband either to deposit a sum of money or to give security for a sum of money to cover the wife's costs, and that sum may be increased from time to time by application to the Court. It seems also to be the practice that where the wife fails and costs are awarded to her, or, rather, to her solicitor—for he it is who gets the costs—the costs properly incurred are not ordered to be paid, but only the costs properly incurred not exceeding the sum paid into Court or secured by the petitioner." That was the practice up to that date. Then Sir George Jessel goes on: "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which, as we know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony pendente lite so

(1) (1881) 6 P. D. 119. (2) 6 P. D. at p. 121.

as to provide for her maintenance. Of course the husband may say 'it is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty.' No doubt it is a hardship, but what would the wife have to say in answer? Suppose the wife had brought him a sum of 10,000*l.*, or 20,000*l.*, or 50,000*l.*, would not she have a right to say 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?' Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into Court, and finally by payment of the proper costs incurred when the suit was heard." Then he goes on to say, in a passage with which I desire to express my entire concurrence (1), "I have given what I believe to be the true view of the origin of the liability of the husband; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs, I think that that reason ought to be sufficient to all right-minded men."

Brett L.J., agreeing with what Sir George Jessel had said, says (2) "to my mind, the reasons that he has given are conclusive to shew that it is not unjust, but, on the contrary, it is a question of high policy and high propriety, and there is no foundation for saying that it is unjust as against the husband that he should pay the costs of his wife's defence, whether that defence be finally made out or not. I entirely agree that no high-minded husband would grudge the expense of enabling the wife to defend herself against such a charge as this, or in any dispute which might unfortunately arise between them. The

(1) 6 P. D. at p. 123. (2) 6 P. D. at p. 124.

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fact of his being her husband ought to make him liable; and there are other reasons which my Lord has given which seem to me to explain this rule. Therefore there is no injustice." The Court also intimated that there was a discretion where the wife failed in her petition or in her defence to limit her costs to the amount paid into Court or secured.

That is the principle which has had effect given to it by r. 158, which states, in terms free from any ambiguity, that the wife has a right from time to time to apply to the Court for an order for security for her costs; and although it is the practice, and I may say the convenient practice, of the Division to make an order in the first instance for the probable amount of costs which will be incurred, and not to make a final order till the trial, of course it has ample jurisdiction, under r. 158, to say at any time before the trial of the action, "You must give security for the costs which have been incurred in these interlocutory proceedings prior to this date": it is not any longer a question of estimate when there has been an actual taxation of the costs, and r. 158 clearly entitles the Court to say, in the first instance, "Proceedings in this action shall be stayed unless you pay what the estimated costs of the wife are." I think the same principle ought to apply when an application is made to stay the proceedings unless, not the estimated but, the ascertained costs of the wife in the interlocutory proceedings have been provided for. [His Lordship then stated the facts of the present case, and continued:—] The learned judge seems to have doubted whether he had jurisdiction to make any order staying further proceedings until after those costs ordered to be paid in this very litigation had been in fact paid, but, with all respect to him, an order of this kind seems to me to be in strict accordance with the old practice of the Ecclesiastical Courts. *Keane* v. *Keane* (1) shews that (though I quite agree that the old practice of the Ecclesiastical Courts is not by statute made applicable to the proceedings for divorce on the ground of adultery, such as the present), and it is, moreover, in direct accordance with the decision of Barnes J. thirteen years ago in *Joseph* v. *Joseph* (2), which, as I read it, has decided this very point, and decided it in a very strong case. That

(1) L. R. 3 P. & M. 52. (2) 76 L. T. 236.

was a petition for divorce; there had been an order for the payment of the respondent's taxed costs. The husband then obtained an order to proceed in forma pauperis; the wife applied, taking this view: The pauper order does not relieve you from your past liabilities to pay past costs, and I ask that proceedings in the petition may be stayed until you pay those costs which the Court has ascertained are due from you to me in respect of this litigation. The registrar refused to make the order, and Barnes J. in March, 1897, made an order staying the proceedings until the wife's costs should be paid. It was not only an assertion of the jurisdiction, but an extraordinarily strong assertion of the jurisdiction, because it amounted to this: that a pauper litigant husband, who could only have obtained the pauper order on the ground of want of means, was not allowed to continue his proceedings unless he paid a sum of 20*l.* odd which was due from him under a prior order. That seems to me a clear and express assertion of the jurisdiction, and we cannot refuse to allow this appeal unless we are prepared to overrule that decision. I certainly am not prepared to do so, for the judgment of Barnes J. seems to me to be consistent with the principles of the Court laid down in *Robertson* v. *Robertson* (1) and embodied in r. 158, and, moreover, to be consistent with justice. In my opinion the appeal must be allowed and the order of the registrar be restored, with this modification only, which is of form and not of substance, that if the amount is either secured or paid the stay will be removed.

BUCKLEY L.J. The husband's petition for divorce on the ground of the wife's adultery still awaits trial. It was first tried before the judge and a special jury upon days ending on December 3, 1909, but it resulted only in this, that the jury were discharged without arriving at a verdict, and there was an order that the husband do pay the wife her costs of the husband's petition. On March 18, 1910, the costs having been taxed, the wife obtained an order that the husband do, within seven days, pay the wife's solicitor 251*l.*, being the amount of the balance of the wife's costs as taxed and certified by the registrar. The

(1) 6 P. D. 119.

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husband is now desirous of carrying his petition to trial, as he is, of course, entitled to do. In that state of things it appears to me that r. 158 is in full operation. This petition has, for the relevant purpose, not yet been tried; there has been an abortive trial, but it still awaits trial, and r. 158 is a subsisting rule. That rule contemplates, in the general case, that the bill or bills of costs shall be carried in before the registrar in order to ascertain what they probably will be; in this case that is not necessary; the costs have been ascertained, an order has been made for their payment, and they have not been paid; and there is a further order for payment of this 251*l.* within a time which has expired. It is the balance of the costs incurred by the wife in proceedings before the trial of the petition. Under r. 158 she is, I think, entitled to say that she has the benefit of that rule for that sum of 251*l.* It is not disputed, although the rule does not say so, that after the costs have been estimated, or in the present case taxed, there may be a stay of proceedings until they are paid or secured. That certainly is the intention of the rule; and that is the way effect is given to the rule. I think the wife is entitled here to have the further trial of the husband's petition postponed until either the order for payment which she obtained on March 18 has been complied with, or until security has been given. The result is that I think we ought to restore the order of the registrar, but inserting words which will allow of the 251*l.* not necessarily being paid, but of security being given for that sum, before the further trial takes place.

KENNEDY L.J. I am of the same opinion. It appears to me that, having regard to the principles upon which litigation of this kind is conducted in the Divorce Court, it is clearly right for the wife in the case of an abortive trial of this kind, which it is sought on the part of the husband to supplement by the reinstitution of the trial before another jury, to have in every way the advantage that the husband should provide the funds; and it seems to me to be only just that, where there is a large sum, undoubtedly due from him upon the first abortive trial, the wife should be entitled to ask the

Court, "Give me the full benefit of that order by not allowing the further prosecution of proceedings until the order of the Court for the payment of the costs has been obeyed by my husband." The case of *Hurley* v. *Hurley and Menzies* (1) has been cited to us, and I desire to say that in my opinion the judgment of Collins J., who was then sitting in that Division, is a good illustration of the view which ought to be maintained in the Divorce Court. In that case there had been a petition by the husband for divorce; the jury had disagreed and were discharged without giving a verdict, as here. The Court, on the application of the wife, made an order that her costs of the hearing should be taxed and paid in full, and refused to limit such costs to the amount deposited in Court. I desire to read a few words from the commencement of the judgment. Collins J. said (2): "I think the wife is entitled to the order asked for. The rule is that, whether the wife is successful or not, the husband is bound to furnish her with the means of carrying on the litigation, and the practice has been for the registrar to estimate a reasonable amount for her costs, which is either paid in or security is given for it. If he has made an accurate estimate, so much better for the wife; but if his estimate is found insufficient when the trial comes on the practice is to enlarge the amount paid in by the husband, so that the wife may continue to be in funds, and to that she is entitled although the result may be that she is divorced. The practice, therefore, seems to me to be that the husband is bound to furnish the estimated amount for the wife's costs entirely independent of the result." That being so, and there being, as I have said, an order for payment of these costs, it is right, and in accordance not only with the practice of the Divorce Court but with what I may call general judicial discretion, that this wife should not be put to further trial without her costs of the first trial being either paid or secured to her. As I understand, the learned judge in this case did not purport, in overruling the registrar, to be exercising a discretion on the special facts; he doubted whether he had jurisdiction to make the order. It comes before us, therefore, as a matter upon which we have to say both what is right, and, if

(1) [1891] P. 367. (2) [1891] P. at p. 368.

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Kennedy L.J.

it be a matter of discretion, how that discretion should be exercised. Now, that the Court has a right in these matters to exercise a discretion with regard to costs payable or due to be paid, and how they ought to be dealt with in regard to the party who has had the order made in his favour before he is troubled with further litigation, is, I think, clear if you look at the general rule laid down in s. 24, sub-s. 5, of the Judicature Act, 1873, which provides "That nothing in this Act contained shall disable either of the said Courts" (that is the High Court or the Court of Appeal) "from directing a stay of proceedings in any cause or matter pending before it if it shall think fit." There is power, therefore, it seems to me, both in accordance with principle and with general grounds of equity, to make the order which my brother Bargrave Deane J. thought he had no power to make. The case of *Joseph* v. *Joseph* (1) has already been referred to; that is a decision distinctly in point, but even if that decision had not existed I should have been prepared to concur in the judgments already pronounced in this Court.

Appeal allowed.

Solicitors: *J. Theodore Goddard*; *Tilleards.*

(1) 76 L. T. 236.

W. C. D.

Followed. COON *v.* DIAMOND TREAD CO. (1938), LTD. [1950] 2 All E.R. 385.

[IN THE COURT OF APPEAL.]

C. A.
1910
May 5.

IN THE ESTATE OF OGILVIE.
OGILVIE *v.* MASSEY.

Probate—Practice — Costs—Taxation—Quantum—Interference with Discretion of Registrar.

As a general rule the Court will not interfere with the decision of the taxing registrar upon a mere question of quantum.

APPEAL from an order of Bargrave Deane J. upon a summons to review taxation.

The action was brought for probate of a will and codicil. The defendants impeached the validity of the codicil on various grounds. The action was tried before Bargrave Deane J. and a special jury, and after a trial extending over several days the learned judge pronounced for the force and validity of the will and codicil and condemned the defendants in costs. The plaintiffs sent in a claim for costs for 3424*l.* odd, but the amount allowed by the registrar on taxation was 2059*l.* 7*s.* only. The plaintiffs objected that as to some of the items the sums allowed were too small, and they took out a summons to review taxation.

Bargrave Deane J. disallowed some of the plaintiffs' objections, but allowed objections 5, 7, and 8 and varied the registrar's certificate by increasing the amount allowed for instructions for brief by 50 guineas, by allowing a small item which had been disallowed by the registrar on the ground that it ought to have been included in the brief, and by increasing the fee allowed to the plaintiffs' leading counsel by 50 guineas and the fees of the plaintiffs' two other counsel in proportion; and he refused leave to appeal.

The defendants, after obtaining the leave of the Court of Appeal, appealed.

Grazebrook, for the appellants. The Court will not interfere with the decision of the taxing registrar as to amount unless he has proceeded on a wrong principle. The practice is regulated

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by rr. 92 to 95 of the Probate Rules, but the practice in the Probate Division does not differ from the general practice.

[He was stopped.]

Bayford, for the respondents. These no doubt are matters of quantum only, but it is the practice of the judges of the Probate Division to interfere in matters of quantum in a proper case.

[KENNEDY L.J. The general practice is summarized in the Annual Practice at p. 1085.]

The registrar proceeded on the view, for which it is submitted there is no foundation, that the costs had been inflated by reason of the largeness of the estate, and he cut them down to the lowest possible figure.

COZENS-HARDY M.R. It is of extreme importance that there should be no doubt as to the general rule on this subject. In 1833, in *Alsop* v. *Lord Oxford* (1), Sir John Leach M.R. said: "Generally speaking, the decision of the Master on taxation is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it; and it is further his duty to inquire whether the business was required to be done; for, if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings. The Court will only interfere where the Master acts upon some mistaken principle." Twenty years afterwards, in 1854, in *In re Catlin* (2) Sir John Romilly M.R. said: "It is admitted, on both sides, that this Court can only be called upon to determine on the propriety of allowing or disallowing items which involve some principle, and not where a question only of *quantum* arises." I should be very sorry if any doubt were cast on that, for I can scarcely imagine a tribunal more unfit than a judge of the High Court to deal with questions of quantum on the taxation of costs. The taxing Master is the person whose duty it is to decide questions of quantum, and it is not right for the judge to interfere in such a matter. If a question of principle arises, no doubt the Court ought to interfere and consider and if necessary correct the view taken by the taxing Master. These objections 5, 7, and 8 are all

(1) (1833) 1 My. & K. 564. (2) (1854) 18 Beav. 508.

solely on questions of quantum, and the registrar states in his answers to the objections that he has considered the matter and fixed a fee after consideration of the circumstances, and I think it would be wrong for us to reverse that decision, there being no question of principle involved. Bargrave Deane J. increased the amount of the fee for instructions for brief and the counsel's fees on the ground that the taxing Master had allowed too little, but in my opinion the order of the taxing Master must be restored.

BUCKLEY L.J. On questions of quantum the decision of the taxing Master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision. In questions of quantum the judge is not nearly as competent as the taxing Master to say what is the proper amount to be allowed; the Court will not interfere unless the taxing Master is shewn to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing Master is conclusive. I think that the learned judge ought not to have interfered.

KENNEDY L.J. I am of the same opinion. I only desire to say that, speaking from my own recollection, what has been stated to be the practice in the Chancery Division is the practice in the King's Bench Division, and I see nothing in any of the Probate Rules to which we have been referred to give the least ground for holding that there is any difference in the practice of the Probate Division which would justify us in upholding the decision of the learned judge.

Appeal allowed.

Solicitors for appellants: *Dale & Co.*

Solicitors for respondents: *Heywood & Ram, for Cross, Ram & Sons, Halesworth.*

H. B. H.

1910

June 27.

SUART *v.* SUART (otherwise HODGSON).

Divorce—Variation of Settlements—Petition by Party against whom Decree pronounced—Consent—Order.

The Court made an order for variation of the marriage settlement at the instance of the respondent in a nullity suit, the petitioner in the suit being stated to be a consenting party to the order.

On July 18, 1899, a decree nisi for nullity was pronounced on the husband's petition, on the ground of the incapacity of the respondent; and on April 2, 1900, that decree was made absolute.

On February 8, 1910, the respondent obtained from Mr. Registrar Hardy, without reference to the judge, leave to file a petition to vary an ante-nuptial settlement dated October 20, 1880; and on March 10, 1910, the petition was filed.

According to the report of Mr. Registrar Inderwick, dated June 7, 1910, the respondent, under the settlement in question, assigned a reversionary interest under an indenture dated April 19, 1872, and also her share in certain trust funds the subject of a settlement dated June 16, 1857, made upon the marriage of her father and mother, her interests under this last-mentioned settlement having been subject to certain life interests of her father, who died in 1886, and of her mother, who died in 1909.

The funds of the settlement the subject of this petition were settled upon the respondent for life without power of anticipation, with a second life interest to the husband (the petitioner in the nullity suit), with a reversion to the children of the marriage (if any), and, in default of children, the funds were to be held for the respondent (the present petitioner) absolutely, if she survived her husband, but, if the latter survived her, she had a power of appointment by will, and, in default of such appointment, for the persons entitled in distribution as upon her intestacy. There was a further covenant by the respondent (wife) to settle after-acquired property, but no such property had in fact been brought in.

The husband purported to assign three policies of assurance on his life to be held upon certain trusts. No notice of assignment

however, was ever given to the insurance companies, and the policies were surrendered in the year 1904. He also purported to settle certain furniture, but it was stated before the registrar that the wife waived any claim she might have in respect thereof, either under the deed as it stood or as it might read if and when varied. The husband also covenanted to bring in after-acquired property, but no such property had in fact been brought into settlement.

The report of the registrar concluded as follows: "I am not aware of a case in which a settlement has been varied by the Court at the instance of a respondent. But the practice of the Court in dealing with such a petition filed on behalf of a respondent in a suit for dissolution of marriage does not appear to be of necessity applicable to the case of the petition of a respondent in a suit for nullity.

"If the Court is of opinion that there is no objection in law to a petition for variation being granted at the instance of a respondent in a nullity suit:—

"It is submitted that the settlement in question should be varied and be read as though no furniture had been settled thereunder and as though the petitioner in the suit had died in the lifetime of the respondent in the suit; and, further, that an order be made that the trustee of the settlement do transfer to the respondent in the suit her trust funds freed from the trusts of the settlement."

Notice of motion was given by the solicitors for the respondent (wife) on June 20, 1910, that the Court would be moved on June 27 "to confirm Mr. Registrar Inderwick's report on the petition to vary settlements herein and for an order in the terms of the first paragraph of the prayer of the said petition and in slight variation of the submission of the learned registrar, as follows:— 'That all rights, powers and interests of the said (husband) in, concerning, and over the wife's trust funds may be extinguished as if he were already dead and she had survived him.'"

Le Bas, for the respondent in the suit, moved the Court, and referred to *Wootton-Isaacson* v. *Wootton-Isaacson*. (1) The words

(1) [1902] P. 146.

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of the Act are very wide and would seem to warrant the Court in entertaining an application by either party to a suit to vary the marriage settlements. The recommendations of the registrar do not seem to meet the requirements of the case. No direction to the surviving trustee of this settlement to transfer the whole of the money in question is necessary. The whole of the money comes from the marriage settlement of the wife's parents; and if the order is made as now asked, the trustee of this present settlement will never get it, seeing that it has not yet passed out of the hands of the trustees of the parents' marriage settlement.

SIR SAMUEL EVANS, PRESIDENT. Prima facie, it would seem that an application to vary a marriage settlement may be made by any party to the suit; but it is not necessary to decide that, because this application is made by consent; and all I decide here is that the application can be made by the respondent in this suit. The important question in these cases is not by which of the parties the application is made, but how the powers conferred on this Court are to be exercised. I make the order in the terms now asked.

Solicitors for the wife (the respondent in the suit): *Crossman, Prichard, Crossman & Block.*

Solicitors for the husband (the petitioner in the suit): *Swepstone & Stone.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A. 1910 June 22, 23.

THE DRUMLANRIG.

Admiralty—Collision—Damage—Both Ships to blame—Limitation of Liability—Admission on Pleadings—Cargo Owner—Division of Loss—Rule in force in the Court of Admiralty—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

The rule laid down in *The Milan*, (1861) Lush. 388—namely, that, where both ships are in fault for a collision, the owners of cargo on one ship can only recover against the owners of the other ship one half of the damage they have sustained—is a rule in force in admiralty within the meaning of s. 25, sub-s. 9, of the Judicature Act, 1873.

Appeal by defendants, owners of cargo on board the *Tongariro*, against a decision of the President (Sir Samuel Evans), disallowing their objections to the report of the registrar in respect of the amount of the damage recoverable by them from the respondents (plaintiffs), the Astral Shipping Company, Limited, owners of the *Drumlanrig*.

The material question raised in the case was: whether there is, (in accordance with the decision in *The Milan* (1)), an admiralty rule, within the meaning of s. 25, sub-s. 9 (2), of the Judicature Act, 1873, under which if two vessels have been in collision, and both have been found to blame, the owners of cargo on one ship are precluded from recovering from the other ship more than a moiety of the damage sustained.

On November 27, 1908, the British steamship *Drumlanrig*, from Buenos Aires to Hamburg, with a cargo of linseed and maize, came into collision off Dover in the English Channel with the British steamship *Tongariro*, outward bound from London to New Zealand via Plymouth, with over 200 passengers and a valuable general cargo, in charge of a duly licensed Trinity House pilot.

(1) Lush. 388.

(2) 36 & 37 Vict. c. 66, s. 25, sub-s. 9: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail."

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Both vessels sustained damage, and, on the same day, an action was commenced in Liverpool by the owners of the *Drumlanrig*, and by the owners of her cargo, against the owners of the *Tongariro* and her freight. On the same day, a cross-action was commenced in London by the owners of the *Tongariro* against the owners of the *Drumlanrig*. These actions were consolidated, the owners of the *Tongariro* being made defendants and counter-claimants.

On December 17, by consent, an order was made staying all further proceedings in the action on the terms that the owners of the *Drumlanrig* pay to the defendants the owners of the *Tongariro* "a moiety of the damages" sustained by them in consequence of the collision, the amount of such damages, if not agreed, to be referred to the registrar and merchants to report the amount thereof, as also, if not agreed, the question as to what consequential damage, if any, to the *Tongariro* was due to the collision, each party paying their own costs of the action.

On June 25, 1909, the Astral Shipping Company, Limited, as owners of the *Drumlanrig*, issued a writ in an action of limitation of liability against the owners of the *Tongariro*, and of her cargo, and her master, crew, and passengers and all other persons claiming to have sustained damage by reason of the collision between the steamships. By their statement of claim the plaintiffs admitted (paragraph 5) that the collision "was partly caused by the negligence of those on board the *Drumlanrig*," and, there being no loss of life or personal injury, they claimed a declaration that the sum for which they were liable was, at 8*l.* per ton, not greater than 33,143*l.* 0*s.* 10*d.*

Under a decree, dated July 26, a sum of 34,214*l.* 10*s.* 3*d.* was paid into Court by the plaintiffs, the owners of the *Drumlanrig*, being their statutory liability for loss or damage to ship or goods, inclusive of interest at 4 per cent. per annum from the date of the collision.

The owners of cargo on the *Tongariro* were not parties to the damage action, but they entered an appearance in the limitation suit, and lodged a claim for damage to goods amounting to 24,668*l.* 17*s.* 8*d.*, of which sum they claimed "one moiety" together with interest and costs. On February 17, 1910, they

amended the claim by striking out the words which limited the amount to "one moiety."

On March 9, the registrar reported on the claims, and with reference to that of the owners of cargo on the *Tongariro* said: "A further point which arose and which should be referred to was whether the owners of cargo could recover for whole or half damages against the fund in court. By their statement of claim in the limitation action the owners of the *Drumlanrig* admitted that they were partly to blame for the collision, and they assert that therefore the owners of cargo can only be paid half damages out of the fund in court. As things now stand it is clear that the owners of the *Drumlanrig* are entitled to put forward this defence. Sect. 503 of the Merchant Shipping Act, 1894, does no more than give a limit to a liability, and if those who pay money into court can reduce the claim below such limit they are entitled to take the balance out of court as has been done in several cases. Therefore, the owners of cargo cannot obtain more than half their damages unless they can prove that the *Drumlanrig* is wholly to blame. They are not bound by the assertion in the statement of claim in the limitation action, and they have the right, just as much as a cargo owner whose claims were adverse to the shipowner who has admitted that the adverse ship is partly to blame,—each claiming against a fund in court—would have to prove that he was entitled to full damages."

On April 28, the owners of cargo on board the *Tongariro* (other than the Postmaster-General, owner of a portion of the cargo) gave notice of motion to vary the report of the registrar "by allowing to the said cargo owners their claims as assessed by the registrar . . . . in full, and that it be declared that under the decree in the present action the said cargo owners are entitled to the whole of their damages without further proof that the *Drumlanrig* was wholly to blame."

On May 2, the President (Sir Samuel Evans) dismissed the motion with costs, and in the course of his judgment (after referring to the case of *The Milan* (1) as binding on him) said "I must assume that the basis of the compromise or agreement

(1) Lush. 388.

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and, therefore, of the decree in this case, was that both vessels, the *Drumlanrig* and the *Tongariro*, were to blame. In the pleadings in the limitation suit, paragraphs 4 and 5 set out pretty clearly what the agreement was, and what the admission of the plaintiffs in the proceedings was. The second head of the agreement set out in paragraph 4 is this: 'The plaintiffs to pay to the defendants a moiety of the damage sustained by them,' and that includes the claim of the cargo owners of the *Tongariro*. Paragraph 5 is 'The plaintiffs admit that the said collision was partly caused by the negligence of those on board the *Drumlanrig*.' Now those two paragraphs are not traversed at all in the defence to the limitation suit. I do not say that the cargo owners of the *Tongariro* cannot take other proceedings to recover the whole of the damage suffered by them, but I have come to the conclusion that this case, being one where the basis of the decree is the agreement of both to blame, is covered by *The Karo* (1); and in *The Karo* (1) it was held that, on the reference to the registrar, the owners of the cargo could not have more than their moiety, but if they liked they could get an issue directed to establish their proposition, if they could establish it, that the blame was solely to be attributed to one vessel, in this case the *Drumlanrig*. That issue is not now asked for in this case, and the owners of cargo of the *Tongariro* are left to pursue any remedies they may have either in this Court or in the King's Bench, to get the other moiety. In these proceedings I must affirm the report of the registrar, and say that the owners of the cargo on the *Tongariro* are not entitled to have more than a moiety out of the fund in court, as the case is absolutely covered by the case of *The Karo*." (1)

In the result the following order was drawn up:—" In respect of the amounts found due to the claimants under the registrar's report, the sum of 34,347*l.* 16*s.* 8*d.*, standing in court to the credit of this action, be dealt with as follows, viz.:—that there be paid to Messrs. Cattarns & Cattarns, solicitors for the owners of the s.s. *Tongariro*, the sum of 11,175*l.* 2*s.* 3*d.* together with interest thereon (524*l.* 3*s.* 2*d.*) at the rate of 4 per cent. per

(1) (1887) 13 P. D. 24.

annum from March 1, 1909, until May 2, 1910, and as solicitors for the owners of the cargo laden on board the s.s. *Tongariro* (other than the Postmaster-General), 10,602*l.* 19*s.* 1*d.* together with interest thereon (529*l.* 17*s.* 2*d.*) at the rate of 4 per cent. per annum from February 1, 1909, until May 2, 1910; to the solicitor for the Postmaster-General the sum of 113*l.* 17*s.* 3*d.*, together with interest thereon (5*l.* 13*s.* 4*d.*) at the rate of 4 per cent. per annum from February 1, 1909, to May 2, 1910, the aforesaid sums representing 50 per cent. of the amounts found due, and that after payment thereof, the balance of the said sum of 34,347*l.* 16*s.* 8*d.* remaining in court, amounting to 11,396*l.* 4*s.* 5*d.*, be invested in the purchase of Treasury bills. Leave to appeal."

1910, June 22, 23. *Bailhache, K.C.*, and *Hugh C. S. Dumas*, for the appellants (defendants), owners of cargo on board the *Tongariro*. It is submitted that the appellant cargo owners are entitled to claim against the fund paid into court in the limitation suit for the whole of the damage sustained by them by reason of the improper navigation of the *Drumlanrig* on the occasion of the collision between that vessel and the *Tongariro*, and even if the decree in the limitation suit be read as establishing that both vessels are to blame for the collision, still the innocent cargo owners are entitled to recover the whole, and not merely one moiety, of their damage.

There is no finding of both to blame, and the cargo owners were not parties to the original damage action which was settled on the terms of the owners of the *Drumlanrig* paying the owners of the *Tongariro* a moiety of their damage. The cargo owners did not become parties until they entered an appearance in the limitation suit, in which the owners of the *Drumlanrig* admitted that they were "partly to blame" for the collision; but the collision took place at a time when the *Tongariro* was in charge of a pilot by compulsion of law, so that if the *Tongariro* was partly to blame, and the fault was that of the pilot alone, the defence of compulsory pilotage, if sustained, would prevent any claim being made against the *Tongariro*. Assuming that that was the basis on which the original compromise was entered

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into, and admitting, for the purposes of argument, that the decree amounts to a finding of both to blame, it is nevertheless contended that there is no admiralty rule, within the meaning of s. 25, sub-s. 9, of the Judicature Act, 1873, under which the owners of cargo on one ship are restricted as against the other ship to a moiety of the damage they have sustained.

The first statement of the rule as to division of loss is in *The Woodrop-Sims* (1), where Sir William Scott (Lord Stowell) discusses the four possibilities under which an accident, involving the loss of a ship and her cargo, may occur through "two vessels running foul of each other" and says: "Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides. In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them." This being the rule with regard to ships, Dr. Lushington forty-six years later in the course of his judgment in *The Milan* (2) said: "The next question is, so far as I know, now distinctly raised for the first time, and is of great importance. It is this, whether, apart from the statute, both ships being to blame, the owner of goods carried in one ship is entitled to recover against the other ship, and if so, whether the whole of his loss or a moiety only." After an elaborate discussion of the question, the learned judge held that the rule in the Admiralty Court that the plaintiff in a cause of collision recovers half damages, where both ships are to blame, applies to the case of the owner of cargo suing alone, and the reason assigned for taking this view is stated (3) as follows: "I apprehend that carrying out this principle the Court of Admiralty must say 'You, the innocent owners of cargo, proceeding against one only of two delinquent ships, shall recover only half your damage, because we can affix to the vessel proceeded against only half the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the owner of the other vessel, which we hold to be equally delinquent.'" From this and other passages in the judgment it would seem

(1) (1815) 2 Dods. 83, at p. 85. (2) Lush. 388, at p. 400.
(3) Ibid. at p. 404.

that the only intelligible explanation of the existence of the rule would be that it rests on the basis of the identification of the innocent cargo owner with those in charge of the carrying ship— that is to say, the learned judge, whilst disclaiming any intention of doing so, has in effect followed *Thorogood* v. *Bryan* (1), where a passenger was held to be identified with the negligent driver of the omnibus in which he was travelling; but that case was overruled by the House of Lords in *The Bernina* (2), and it is submitted that, as the ground for the existence of the supposed rule is gone, the case of *The Milan* (3) should also be overruled, as it misapplies to the case of cargo a rule applying to ships.

The decision in *The Milan* (3) has been repeatedly questioned: see the remarks of Lord Esher M.R. in *The Bernina* (4): "We desire to say that we do not express in this judgment any opinion as to whether an action brought at common law in respect to damage to cargo will, by virtue of the above section (Judicature Act, 1873, s. 25, sub-s. 9), be governed by the admiralty practice, laid down in the case of *The Milan* (3), or whether the application of the section is to be limited to actions for injury to one of two ships, or to both, by a collision between them; or whether even in an admiralty action by an owner of cargo the whole of the judgment in that case will ultimately be upheld." This passage is also quoted by Sir Gorell Barnes in the case of *The Circe*. (5) See also the remarks of Sir F. H. Jeune in *The Frankland* (6): "I should not like to rely strongly upon that case (*The Milan* (3)), even if I thought it applied, because there is no doubt that the most intelligible principle upon which *The Milan* (3) rests is the identification of the cargo owner with the ship. That principle has been so shaken in the case of *The Bernina* (2) that I should not be prepared to rely upon the decision in *The Milan* (3) as one which ought to be followed in the present day." See also the remarks of the same learned judge in *The Englishman and The Australia*. (7)

(1) (1849) 8 C. B. 115.
(2) (1887) 12 P. D. 58; (1888) 13 App. Cas. 1.
(3) Lush. 388.
(4) 12 P. D. 58, at p. 83.
(5) [1906] P. 1, at pp. 9, 10.
(6) [1901] P. 161, at p. 167.
(7) [189]4 P. 239, at p. 244.

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[Reference was made to the cases of *The Vera Cruz* (1), *The City of Manchester* (2), *The Hochung*. *The Lapwing*. (3)]

Aspinall, K.C., Laing, K.C., and *R. H. Balloch*, for the respondents (plaintiffs), the owners of the *Drumlanrig*. The rule, governing the practice in admiralty, of decreeing a moiety of the damage, as well of cargo as of ship, where both ships are to blame, was not invented by Dr. Lushington, for he states in *The Milan* (4) that "the practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame, and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage," and he cites the case of *Hay* v. *Le Neve* (5) and a number of unreported cases where half the value of the cargo was pronounced for, and that learned judge further states that the same practice prevailed in the Court of Appeal, and mentions the names of cases there decided, particularly one before the Judicial Committee in the year in which he gave his judgment, and since that time (1861) the rule has been invariably followed in the admiralty registry.

Secondly, the rule is not based on the doctrine of identification laid down in *Thorogood* v. *Bryan* (6), for Dr. Lushington in his judgment, after referring to that case, distinctly declined to follow it: see the passage in his judgment dealing with this point set out at length by Lord Esher M.R. in *The Bernina* (7), who adds "It has been supposed that the ultimate judgment of Dr. Lushington was inconsistent with this stout disagreement; but he decided to give the plaintiff only half his loss upon wholly other grounds, peculiar to the Admiralty Court." The fact that *Thorogood* v. *Bryan* (6) has been overruled has, therefore, no bearing on the present question.

It is further submitted that it is not material for present

(1) (1884) 10 App. Cas. 59.

(2) (1879) 5 P. D. 3; ibid. (1880) 221; see remarks of James L.J. at foot of p. 222.

(3) (1882) 7 App. Cas. 512.

(4) Lush. 388, at p. 401.

(5) (1824) 2 Shaw's Scotch Appeals 395. In the judgment (pp. 403—405) the case of *The Petersfield against The Judith Randolph* is referred to, decided in 1789 by Sir James Marriott.

(6) 8 C. B. 115.

(7) 12 P. D. 58, at p. 76.

purposes to consider what the basis of the rule may be, nor is anything gained by collecting the expressions of doubt as to the soundness of the rule contained in the dicta of learned judges, nor to discuss whether Dr. Lushington was right or wrong in saying that it is an endeavour to administer justice more equitably than is done by the rule of the common law applicable to this class of case, because this Court, having adopted and applied the rule, cannot do otherwise than follow it. In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1) Lindley L.J. says, "The action viewed as an action of tort appears to come distinctly within s. 25, sub-s. 9, of the Judicature Act, 1873; and the rules of the Admiralty Court have to be ascertained and applied. It becomes unnecessary, therefore, to discuss the doctrine laid down in *Thorogood* v. *Bryan* (2) and other cases of that class; for the Admiralty Court has never adopted that doctrine: see *The Milan.* (3) According to the rules of the Admiralty Court, if the two ships had belonged to different owners, then as both ships were to blame the plaintiffs (cargo owners) would have been entitled to recover one-half of the amount of their loss from the owners of the *Atjeh* and one-half from the owners of the *Crown Prince*: see *The Milan.*" (3)

Dumas in reply. In an action framed upon the contract of carriage, the rule as to division of loss has no application. The cargo owner can, therefore, subject to the terms of the bill of lading, recover full damages from the owners of the carrying ship: *The Bushire.* (4) So when both ships were in fault, the innocent owner of cargo on board either ship could formerly, in a common law action for tort, have recovered the whole of his loss against the owners of either ship: see Marsden's Collisions at Sea, 5th ed., p. 130; and there seems no sound reason why, under the rule laid down in *The Milan* (3), the innocent cargo owner should now only be able to recover half his loss in tort.

(1) (1883) 10 Q. B. D. 521, at p. 545.
(2) 8 C. B. 115.
(3) Lush. 388.
(4) (1885) 5 Asp. M. L. C. 416.

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The decision in the case of *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1)—relied upon by the respondents as affecting the power of this Court to overrule *The Milan* (2)—was given before the House of Lords decided *The Bernina.* (3) This fact is noticed by Sir F. H. Jeune in *The Englishman and The Australia* (4), where he says "It is not necessary to consider how far the authority of *The Milan* (2), recognized by the Court of Appeal in the case of *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1), was shaken by the observations made by the same Court in the subsequent case of *The Bernina.*" (5)

The American Courts have not followed *The Milan* (2) : see *The Atlas.* (6)

VAUGHAN WILLIAMS L.J. I do not think it is necessary that I should take time to consider my judgment, although this is a very important case, and a case which, as I understand, is brought really for the purpose not only of deciding this particular dispute, but of getting a decision which will affect a large number of cases which those who send cargoes to sea may be very anxious to have determined. I cannot help saying I am glad to understand that this case is likely to go to the House of Lords.

When one is told that the rule in question—the rule, that is, that we are asked to say is a rule of the Admiralty Court in the sense mentioned by s. 25, sub-s. 9, of the Judicature Act, 1873—is a rule which cannot be supported upon any principle, and can only be supported because it is there, and is a rule which is in actual application in the Admiralty Division, one is certainly minded to look very closely and see whether this particular rule is a rule in the sense of which I have just been speaking.

Whatever the rule is, it is a rule which admittedly, at the time when it was laid down by Lord Stowell, did not apply to cargo at all. The rule, as laid down by Lord Stowell, was laid

(1) 10 Q. B. D. 521.
(2) Lush. 388.
(3) 13 App. Cas. 1.
(4) [1894] P. 239, at p. 244.
(5) 12 P. D. 58.
(6) (1876) 93 U. S. Rep. (3 Otto.) 302.

down in *The Woodrop-Sims*. (1) The rule is thus spoken of by Lord Stowell: "This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place it may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other vis major; in that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides. In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." Lord Stowell in that case was merely dealing with the case as between two ships, and was not dealing at all with the case of a cargo carried in one of the ships being damaged. That being so, I think it is not disputed—at all events it is very arguable—that the case of *The Milan* (2), in so far as it applied Lord Stowell's rule to cargoes, was an extension of the rule beyond anything to which it had previously been applied. It is quite true that in some passages of his judgment Dr. Lushington does speak of it as if it was not an extension of Lord Stowell's rule, or at all events not a new extension of the rule, because he says (3): "The practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage." Then he goes on to mention the case of *Hay* v. *Le Neve* (4) as well as a number of other cases, in which he speaks of half the value of the cargo being what was recovered. The reporter's

(1) 2 Dods. 83, at p. 85.
(2) Lush. 388.
(3) Lush. 388, at p. 401.
(4) 2 Shaw's Scotch Appeals, 395.

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note at the bottom of p. 401, however, with reference to these latter cases is: "The above cases are not reported at all, or do not mention the point in question." The result of this has been that we have not got these cases before us.

It is also very remarkable that if you look at the decision of Lord Stowell you really find it is a decision which, even as between ships, it is difficult to account for upon any principle unless (although it is not nearly so plainly so as it is in the case of *The Milan* (1)), you are identifying the owner of the cargo with the vessel in which the cargo is being carried. The owner of the cargo being possibly, at all events, guilty of no negligence and no wrong-doing at all—being what is called in the cases "innocent"—is made to accept from each of the ships the half of the damage sustained, and it seems to me almost impossible to justify the application of this rule without resting it upon the principle of the identification of the cargo owners with the owners of the ship, or the ship in which it is carried. The fact that Dr. Lushington should have applied this rule as to the division of loss in this way and based it upon this principle is all the more remarkable because he does it after a forcible denunciation of the absence of principle in the case of *Thorogood* v. *Bryan* (2), the omnibus case in which the passenger is identified with the omnibus and prevented from recovering any damages at all. Having denounced that decision as utterly incompatible with any known principle, Dr. Lushington proceeds to apply half of this principle which he has just denounced—it is too unprincipled and too illogical to say that the passengers shall not recover at all; but there is just enough force left in the doctrine to enable one to come to the conclusion that the cargo owner shall be content, when he is suing a person from whom he can get the whole of the damages, to get judgment against that man only for one half. But what I have got to deal with here is something quite different really from the mere question of what was decided by *The Milan*. (1) I have not, according to my view, even got to decide whether what was decided in *The Milan* (1) was right or wrong. As the case is brought before us here, if the respondents are right, I have not got any jurisdiction really to consider whether

(1) Lush. 388. (2) 8 C. B. 115.

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The Milan (1) was right or not. As I have said already, there is a great deal of ground for saying that the decision of Dr. Lushington, applying Lord Stowell's rule to cargoes, was an extension of Lord Stowell's rule. I suppose that after that decision was given the question of the propriety of that decision might have been raised at any time, at all events in an Appellate Court; but what is said now is that even on the supposition that there was no authority to justify Dr. Lushington's statement that the rule as to division of loss had been applied to cargoes before, now it has been applied so often and in so many cases that it has become a rule; and if it has become a rule I take it that it falls within the words of s. 25, sub-s. 9, of the Judicature Act, 1873, "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail." If this is now really a rule I doubt very much whether we should have any right to alter it; but be that how it may, whether theoretically we have a right to do so or not, one would not be disposed, even if one had jurisdiction to do so, to revoke a rule which has been in force for so long. Speaking for myself, not only am I of opinion that this is a rule which has been in constant application for a very long period, but I am also of opinion that it is a rule which the Court of Appeal recognized as being a rule of the Admiralty Court in the decision in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (2) It is quite true that in that case there were three Lords Justices, namely, Brett, Lindley and Baggallay L.JJ., but Lindley L.J., with whom Baggallay L.J. concurred, said (3): "Assuming then that the defendants are liable to the plaintiffs for the loss occasioned by the negligence of the master of the *Atjeh*, it is necessary to determine the amount of damages to which the plaintiffs are entitled. The action viewed as an action of tort appears to come distinctly within s. 25, sub-s. 9, of the Judicature Act, 1873; and the rules of the Admiralty Court have to be

(1) Lush. 388. (2) 10 Q. B. D. 521.

(3) 10 Q. B. D. at p. 545.

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ascertained and applied. It becomes unnecessary, therefore, to discuss the doctrine laid down in *Thorogood* v. *Bryan* (1) and other cases of that class; for the Admiralty Court has never adopted that doctrine: see *The Milan*. (2) According to the rules of the Admiralty Court, if the two ships had belonged to different owners, then as both ships were to blame the plaintiffs would have been entitled to recover one-half of the amount of their loss from the owners of the *Atjeh*, and one-half from the owners of the *Crown Prince*: see *The Milan*." (2) Then they go on to determine what was the question in that case, how far that rule, which they clearly recognize as a rule, would apply or extend to a case where both ships belonged to the same owners, and the judgment proceeds: "As both ships belong to the same owners, the above rule would render the defendants liable for both halves, i.e., for the whole of the loss, and this would be the proper result, were it not for the special stipulation contained in the bill of lading and which exonerates the defendants from the share of the loss attributable to the negligence of those in charge of the *Crown Prince*. The contract in this case exonerates the defendants from half of the loss, and leaves them liable for the other half; and the plaintiffs are entitled to judgment on this footing." After that decision, however fully we may have a right to review the decision of Dr. Lushington in *The Milan* (2), here we have a decision which we must loyally follow—the decision which I have just read.

This particular case is one which really, I think, on the face of it, shews how little the rule as to damages is based upon any principle. In this case the money having been brought into Court in the limitation of liability suit, when you have deducted from that sum the amount necessary to meet these halves, there is still a large sum, about 11,000*l*., left, and the question arises is the rule that I have been referring to such that the cargo owners cannot come upon this balance—the unused balance of the sum in Court—for the other half of their damages? We must hold that they cannot do so.

FLETCHER MOULTON L.J. This case arises out of a collision between the ship *Drumlanrig* and the ship *Tongariro*. The

(1) 8 C. B. 115. (2) Lush. 388.

Drumlanrig has paid into Court the maximum amount for which she can be held liable under the provisions for the limitation of liability, with an admission that she was partly to blame for the collision. By the frank statement of counsel for the appellants we have to decide this case upon the basis that the *Tongariro* was also to blame.

The actual point before us arises from the fact that the owners of the cargo on the *Tongariro* have sent in a claim against the fund in Court for the whole of the damages that they have suffered by the collision. The registrar, acting upon what is admitted to be the rule universally applied in such cases, has allowed them only one half of the amount of their damages, the consequence of so doing being that there will be a surplus of the fund in Court rather greater than the remaining half of the cargo owners' damages, which will, on our decision, be handed back to the owners of the *Drumlanrig*.

The appellants contend that they are entitled to receive out of the fund in Court the whole of the damages which they have suffered. They do not deny that the rule which received its first judicial enunciation in the judgment of Dr. Lushington in the case of *The Milan* (1), and which has always been followed, is against them; but they desire to get that case overruled and the rule now in force replaced by a rule that the owners of cargo are entitled to receive their full damages.

I think the points which we have to decide are very short, and we have had the assistance of an extremely able argument and been referred, I believe, to all the cases which can possibly assist us. It is evident that from a very early date—certainly as early as 1815—the Admiralty Court refused to adopt the common law doctrine that where there has been a collision arising from the fault of both vessels, both, being guilty of negligence, must bear their own loss; and in the case to which we were referred, *The Woodrop-Sims* (2), it was laid down that the Admiralty Court apportioned the total loss between the two guilty parties, but no method of apportionment was laid down. I cannot help thinking that the case in the House of Lords in 1824,

(1) Lush. 388. (2) 2 Dods. 83.

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Hay v. *Le Neve* (1), shews that at that time the accepted rule of apportionment was in halves. Certainly the rule as to halves seems to have been applied to the case of ships. In *Hay* v. *Le Neve* (1) it was applied also to cargo. In *The Milan* (2) the point we have to decide came before Dr. Lushington. The state of the law at that time was as follows: In *Thorogood* v. *Bryan* (3), a case of collision between two omnibuses, a passenger in one of the omnibuses was held at common law to be so identified with the omnibus that if there had been negligence on the part of the driver of his omnibus he could not recover. No doubt this doctrine of identification was accepted in the Courts of common law. Now it was urged in the case of *The Milan* (2) that the Admiralty Court ought to adopt the same rule, and that the negligent navigation of the carrying vessel should be held in law to be the negligence of the owners of the cargo carried. Dr. Lushington firmly refused to follow the common law doctrine on that point. I do not think that this decision of Dr. Lushington has been treated in the argument of this case in the way in which it should have been treated. It has been contended that he did not mean what he said. His words are as clear as words can be, and I have not the slightest doubt that he meant to say all he did say, and I can find no objection whatever to the part of his decision which is here material. He refers to the case of *Thorogood* v. *Bryan* (3), which he says has been put before him as laying down a rule of law which would have the effect of rendering a cargo owner so far identified with the ship which is carrying his cargo that the negligence of those on board the ship must be taken to be his negligence. He says: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and lastly, because it is directly against *Hay* v. *Le Neve* (1), and the ordinary practice of the Court of Admiralty;—for if, by the practice of the Court of Admiralty, the owner of a

(1) 2 Shaw's Scotch Appeals, 395. (2) Lush. 388.
(3) 8 C. B. 115.

delinquent ship, where both ships are to blame, may recover one-half of his loss, a fortiori the innocent owner of the cargo cannot be deprived of a like remedy." Thus in the clearest way possible he says that he has decided this case upon the practice of the Admiralty Court, and he rejects the doctrine distinctly laid down and accepted in common law. That is not the only part of the judgment which shews that his judgment is intentionally in defiance of the common law doctrine and is based upon the admiralty practice. At p. 401 he says that "the practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame, and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage." He gives five or six cases in which that had been so held, and they shew that it had been so held not only in a Court of first instance, but in the Court of Appeal and the Judicial Committee of the Privy Council. No judge could have made it plainer that this was an admiralty decision rejecting the doctrine of the Common Law Courts as laid down in *Thorogood* v. *Bryan*. (1) Then, in the concluding parts of his judgment, he gives the reasons which he believes to underlie the admiralty practice.

Now the President of this Court seems to think that this admiralty practice is very unjust. For my own part I think that if you consider the whole question broadly it is just as likely to do justice in the majority of cases as the doctrine which prevails at common law; but, whether it is just or not, Dr. Lushington lays down, and I think he rightly lays down, that it has become the admiralty practice. He suggests a very plausible reason for it. He suggests that the Admiralty looked upon the two ships as two tortfeasors, and divided the responsibility equally between them, so that the owner of the cargo recovered one half from one ship and the other half from the other ship. That, certainly, is at least as just a doctrine as the common law doctrine that there is no contribution between tortfeasors. It is suggested that the decision in *The Milan* (2) has been affected by the fact that the decision in *Thorogood* v. *Bryan* (1) has been overruled by

(1) 8 C. B. 115. (2) Lush. 388.

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the decision in *The Bernina*. (1) How a case, in which the judge elaborately makes it clear that so far from basing his decision on *Thorogood* v. *Bryan* (2) he decides as he does in spite of *Thorogood* v. *Bryan* (2), can possibly be affected by the overruling of *Thorogood* v. *Bryan* (2) I do not see, and it is quite clear that the judges who overruled *Thorogood* v. *Bryan* (2) realized this, for Lord Esher points out (3) that this case of *The Milan* (4) does not depend upon *Thorogood* v. *Bryan*. (2) So that the matter is absolutely unaffected by anything that has happened since, excepting one thing to which I am going to refer, the effect of which is in my opinion to make the Admiralty Rules permanently binding on us. It is to be found in s. 25, sub-s. 9, of the Judicature Act, 1873, which reads: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail." I ask myself what rules were in force which were or could be at variance with the rules of common law, and the answer seems to me to admit of no doubt—one of those rules is the rule with regard to damages, by which only one half of the damage can be recovered against the other wrong-doing ship. This rule was in force and was constantly applied before the Judicature Act, 1873, was passed, and therefore on the interpretation of this provision in the Judicature Act I hold that by statute the rule in *The Milan* (4) was directed to prevail, and that, in spite of *Thorogood* v. *Bryan* (2) or any other doctrine, it was to be the rule to be applied in the Court of Admiralty, and nothing else. Even if I doubted as to the interpretation of this provision in the Judicature Act I do not think it is open to this Court to take a different view. In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (5) Lindley L.J., who delivered a judgment in which Baggallay L.J. concurred,—the judgment of the majority of the Court—distinctly lays down that this rule is

(1) 13 App. Cas. 1.
(2) 8 C. B. 115.
(3) 12 P. D. 58, at p. 76.
(4) Lush. 388.
(5) 10 Q. B. D. 521, at p. 545.

referred to in the section in the Judicature Act which I have read, and decides that it is therefore made binding. We have no power to overrule that decision.

In these circumstances I hold that, both by the interpretation which I myself should put upon that section of the Judicature Act and by the authoritative interpretation put upon it in this Court in the *Chartered Mercantile Bank Case* (1), this rule is a rule that is to prevail. Therefore the appeal must be dismissed.

BUCKLEY L.J. A collision having taken place between the *Drumlanrig* and the *Tongariro*, an action was brought in the Admiralty Division by the owners of the one steamship against the owners of the other, in respect of the damage or loss. Those proceedings were compromised, and effect was given to the compromise by a consent order, by which the President (Sir Gorell Barnes) condemned the owners of the *Drumlanrig* and their bail in a moiety of the damages of the owners of the *Tongariro*. The claim of the owners of the *Tongariro* has been brought in and allowed at 22,350*l*., a moiety of which would be 11,175*l*. The owners of the *Drumlanrig* took proceedings to obtain a limitation of their liability, and that resulted in the ascertainment of a sum of 34,000*l*. odd as the limit of their liability. That sum has been paid into Court. The owners of cargo on the *Tongariro* have brought in their claim, which has been allowed at 21,433*l*. There is sufficient, therefore, in the 34,000*l*. in Court to answer 20*s*. in the pound upon the 21,000*l*. of the cargo owners and the 11,000*l*. of the shipowners; but the owners of the *Drumlanrig* say that the owners of cargo on the *Tongariro* are not entitled to more than one moiety of the amount of their damages, namely, about 10,700*l*., and that there ought to be repaid to them the balance which would result, namely, between 10,000*l*. and 11,000*l*. The question is whether that is right or wrong.

In the proceedings neither vessel has been found to blame, because the order was made by consent, but in the limitation suit the *Drumlanrig* admitted herself to be partly to blame, and counsel appearing for the owners of the cargo on the *Tongariro*

(1) 10 Q. B. D. 521.

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have elected to argue this case as if there had been a finding that the *Tongariro* also had been to blame. We have therefore to treat the case as if there were a finding of both to blame. The case has been presented to us by the appellants as if the matter for determination were: whether in December, 1861, Dr. Lushington rightly decided the case of *The Milan*. (1) Speaking for myself, I may say that I cannot find that the decision in *The Milan* (1) was based upon any legal principle at all. Counsel for the appellants say that it was based upon the principle of *Thorogood* v. *Bryan* (2), and that inasmuch as *Thorogood* v. *Bryan* (2) has been overruled by *The Bernina* (3), it results that *The Milan* (1), if decided upon that principle, was decided upon a wrong principle and must be disregarded. But even if *The Milan* (1) was not rightly decided, so far as legal principle is concerned, the result is not, in my view, to assist the appellants at all.

The facts in *The Milan* (1) were that both vessels were to blame, but the *Lindisfarne* was to blame in such a way as that, by virtue of s. 298 of the Merchant Shipping Act, she could not recover because she had been guilty of a breach of the regulations. The question was whether the cargo owners of the *Lindisfarne* could recover. They were the claimants. Counsel for the appellants have sought to say that Dr. Lushington decided *The Milan* (1) upon the ground that the cargo owners were in the same position as the *Lindisfarne*, the ship, except that the cargo owners were not, by reason of s. 298 of the Merchant Shipping Act, precluded from recovering. That argument has failed to convince me. It seems to me that Dr. Lushington proceeded upon this footing: The right of the cargo owners in a Court of law would have been one thing, but the judge is sitting in the Court of Admiralty, which has higher notions of justice. The Court of Admiralty thinks it right in the case of ships that if both are to blame they should divide the loss between them, and the same principle should be extended to the case of cargo owners. I cannot find that he was asserting that, upon any legal principle, there was any

(1) Lush. 388. (2) 8 C. B. 115.

(3) 13 App. Cas. 1.

right to do that which he was about to do, but he said, "Sitting here in the Court of Admiralty this is what I think just and fair and what it is the practice of this Court to do, and therefore I shall do it." The question has been raised whether Dr. Lushington was adopting this practice for the first time. I find him saying this: "The practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame, and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage." Therefore it seems to me that if *The Milan* (1) is to be treated as a decision based upon legal principle, it rested upon none at all, and is wrong; but if it is an enunciation of the rule which the Court of Admiralty had thought fit to adopt because it thought it fair, that is a totally different matter. Its validity in point of law depends upon whether it is a rule within the meaning of s. 25, sub-s. 9, of the Judicature Act. Is this a rule of the Court of Admiralty? That section mentions "rules hitherto in force in the Court of Admiralty" and "rules in force in the Courts of common law,' and a little later "rules of equity" and "rules of the common law." It is a little difficult to say exactly what the word "rules" means here, but I understand it to extend to such things as the following. As we all know, the rule in the Court of Chancery was that if there was a secured creditor, the secured creditor in administration was entitled to prove for his whole debt and also to realize his security. That is not the rule of the Court of Bankruptcy. That is one illustration. Again, the rules of equity were rules which were adopted in Courts of Equity because equity thought law did not do justice and therefore introduced rules of her own, and those rules were inconsistent with, and repugnant to, and overrode the practice and rules of the Courts of law. Here there is a Court of peculiar jurisdiction, the Court of Admiralty, and it has rules. It thought it fair in certain circumstances not to follow the principles of the common law, but to adopt the rule that as between two tortfeasors the rule of law shall not be followed that neither can sue the other, but that they shall share the loss

(1) Lush. 388.

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between them. That, I apprehend, was a rule of the Court of Admiralty. Sect. 25, sub-s. 9, gave it, I think, legal validity.

Moreover in my view, so far as this Court is concerned, the matter is concluded by the decision in the case of *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1) That case decided that the practice or rule in *The Milan* (2) was at the passing of the Judicature Act, 1873, a subsisting rule in the Court of Admiralty, and became by s. 25, sub-s. 9, a rule of the Courts of law.

For these reasons I think that this appeal fails.

Appeal dismissed with costs.

Solicitors for appellants (defendants), the owners of cargo on the *Tongariro*: *Cattarns & Cattarns.*

Solicitors for respondents (plaintiffs), the owners of the *Drumlanrig*: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

(1) 10 Q. B. D. 521. (2) Lush. 388.

T. L. M.

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June 20, 27;
July 4, 18, 21.

Divorce—Husband's Petition—Person named and cited as Co-respondent—Scotsman—Foreign Domicil, Allegiance, or Residence of Co-respondent—Liability for Costs or Damages—Discretionary Power of Court to dismiss Co-respondent from Suit—Refusal—Co-respondent's Motion dismissed with Costs.

Whatever it is that determines the jurisdiction of this Court with regard to co-respondents, that jurisdiction does not depend upon the domicil of the co-respondent, nor is it to be determined by the question whether the co-respondent is or is not a British subject.

So far as a co-respondent is concerned, the citation corresponds with what would have been, before the Matrimonial Causes Act, 1857, came into operation, the writ in an action for criminal conversation.

Service of the citation and sealed copy of the petition upon a co-respondent, if out of England, places him on the same footing with regard to jurisdiction as a defendant properly served with a writ out of the jurisdiction under Order XI. in the King's Bench or Chancery Division.

The claim against a co-respondent in a divorce suit is merely a personal claim for money, and is not complicated with questions of international law arising out of status, as in the case of a petitioner and respondent.

Although a judgment, following on a verdict for damages in a divorce suit in this Court, could not be enforced against a foreigner in a foreign country, it might possibly be enforced against a Scotsman or an Irishman, in Scotland or Ireland, by means of the Judgments Extension Act, 1868.

The enactment in s. 42 of the Matrimonial Causes Act, 1857, providing for service of any person at any place is only a municipal law in favour of those who sue in this Court; and the Legislature thereby does not concern itself with the question whether an order against a co-respondent for payment of damages or costs in a proceeding begun by citation served abroad would or would not be enforceable as a foreign judgment in another country. The object of the provision is that this Court may make the order and may enforce it against any property which the person against whom the order is made may have within its own jurisdiction or within its own reach.

As the Act gives power to serve anybody as co-respondent anywhere, it gives jurisdiction to make any order against the co-respondent, and

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to issue process of execution to enforce the order in this country; and this can be done without in any way affecting any international comity or offending any international susceptibilities.

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THIS was a motion on behalf of the person named as co-respondent in the petition asking that he might be dismissed from the suit.

The petition of Frederick William Rayment, filed on May 17, 1910, prayed for a dissolution of his marriage on the ground that Dorothy Aloysius Rayment, his wife, had committed adultery with Harry J. Stuart, otherwise J. H. Stewart, the person named as co-respondent in the said petition, but no damages were claimed.

The respondent entered an appearance, but filed no answer.

The person named as co-respondent in the petition, and who was served in Scotland on May 25, 1910, with a copy of the petition and citation, entered an appearance under protest on June 2, 1910, and, while denying adultery, took objection to the jurisdiction of the Court, in that he was and always had been domiciled in Scotland, and was therefore not subject to the jurisdiction of the English Court.

Compston moved to dismiss from the suit the person named as co-respondent in the petition on the ground that he was domiciled in Scotland. The co-respondent was born in Edinburgh and always, except during short visits, lived there. The Court has no jurisdiction over him, and he has only entered an appearance under protest. Even if he had entered an unconditional appearance, *Grange* v. *Grange and Arendt* (1) would be an authority for holding that he ought to be dismissed from the suit. He is also entitled to his costs.

Gaynor v. *Gaynor and Degliantoni* (2) is a case similar to the present one; there the appearance was under protest. In *Levy* v. *Levy and De Romance* (3) the alleged adultery was committed in England, and the person named as co-respondent

(1) [1892] P. 245. (2) (1862) 31 L. J. (P. & M.) 116.
(3) [1908] P. 256.

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was dismissed from the suit on the ground of his French domicil. It would appear that in a case of *Fairfax* v. *Fairfax and De la Crux* (1) costs were not given, but it is submitted that that is no authority, the point as to costs being dealt with simply as a matter of discretion on the facts of the particular case.

Barnard, K.C., and *Rowland Thomas*, for the petitioner, contra. All the cases down to one not yet cited have always arisen with regard to foreigners, as distinguished from British subjects, and it is submitted they do not govern a case like the present one, where the Court is dealing with a British subject domiciled in Scotland. The case not yet cited, and which is most against the petitioner, is *Baker* v. *Baker and Dwyer*. (2) In that case the person named as co-respondent was a British subject domiciled in Ireland. The point now submitted was not put before the Court in that case. Of course, if the Court should hold itself bound by that decision, the petitioner cannot now succeed. It is submitted, however, that that decision is bad in law and not binding on the Court. In order to give this Court jurisdiction in such a proceeding as this the husband's domicil must be English. That is the foundation of the Divorce Acts and Rules; but on the question whether this Court has jurisdiction over the person named as co-respondent the material question to be considered is not his domicil, but whether any order that this Court may make as to costs can be enforced against him—in this case in Scotland. In *I'Anson* v. *I'Anson and Oldbury* (3), which was decided against the co-respondent on the merits, and not upon any point of law, it appears from a shorthand note that the case of *Baker* v. *Baker and Dwyer* (2) was not cited. The words of Sir Gorell Barnes, President, are as follows: "I do not think it necessary to reserve my decision to inquire into the real ground on which this sort of case should be put, and, if necessary, I will reserve my right to criticize it in considering it some other day. I have my doubts how far domicil comes into a matter like this; but, whether it is so or not, my view of the facts is that this is not a bona fide attempt to change his domicil, but that it is merely done to get rid of

(1) (1909) Unreported.
(2) [1908] P. 257.
(3) Unreported. Sir Gorell Barnes, President, January 11, 1909.

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the obligation that this suit will entail. Therefore I decline to make the order."

Under s. 28 of the Matrimonial Causes Act, 1857 (1), a husband petitioning for dissolution of his marriage on the ground of his wife's adultery is bound to make the alleged adulterer co-respondent, unless the Court gives him leave to proceed without doing so. In the present case, the co-respondent being a British subject, means will be available to the petitioner for enforcing an order for costs if obtained.

Compston, in reply. The Court is asked by the petitioner in this case to overrule not only the decision in *Baker* v. *Baker and Dwyer* (2), but the principle laid down, within two years of the foundation of the Divorce Court, in the case of *Yelverton* v. *Yelverton*. (3) The language there used is very wide and has never before been questioned. It is submitted that upon all the authorities Scotland and Ireland are in precisely the same position as any foreign country.

Barnard, K.C., called attention to the words of Sir G. Jessel M.R. in *In re Orr Ewing, Orr Ewing* v. *Orr Ewing* (4) : "To talk of Scotland as a foreign country, and to say that the same rules apply as if it were a foreign country is, I think, a great error. It is not only an integral part of this kingdom, but the judgment of this Court can be enforced in Scotland in the same way that the judgment of a Scotch Court can be enforced in England."

By direction of the learned PRESIDENT (SIR SAMUEL EVANS) the case was re-argued.

June 27. The argument on behalf of the person named as co-respondent was, at the suggestion of the learned PRESIDENT, taken as repeated.

Barnard, K.C., and *Rowland Thomas*, for the petitioner. The Matrimonial Causes Act, 1857 (1), s. 27, makes it lawful for any husband to present a petition for dissolution of marriage.

(1) 20 & 21 Vict. c. 85.
(2) [1908] P. 257,
(3) (1859) 1 Sw. & Tr. 574.
(4) (1882) 22 Ch. D. 456, at p. 465,

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Le Mesurier v. *Le Mesurier and Others* (1) overruled a good many earlier cases, but the restriction as to domicil merely applies to the right of a petitioner to proceed for a divorce. Then by the Matrimonial Causes Act, 1857 (2), s. 28, it is provided that the alleged adulterer is to be made co-respondent, unless on special grounds the Court excuses the petitioner from so doing. There are no special grounds here on which the Court would allow the present petitioner to proceed without naming the co-respondent, whom he knows. He might as a matter of procedure have issued a citation against the respondent only, and then have come here and asked to be excused from citing any one as co-respondent. The cases of *Gaynor* v. *Gaynor and Degliantoni* (3), *Grange* v. *Grange and Arendt* (4), and *Levy* v. *Levy and De Romance* (5), cited in support of the application, do not apply to the present case, as they were cases in which the co-respondent was a foreigner domiciled abroad, and no order against any of them would have been of any use. The first of those three reports does not, unfortunately, state the domicil of the person named as co-respondent, but from his name it would appear that he was an Italian.

[SIR SAMUEL EVANS, PRESIDENT. That case shews that it is not material to consider where the adultery took place.]

That is rather doubtful. It is submitted that if a foreigner were to come to this country, and the wrong were committed in this country, this Court would have full jurisdiction over the matter, although any order for costs might prove ineffectual.

It is conceded that *Baker* v. *Baker and Dwyer* (6) is opposed to the present contention of the petitioner.

[SIR SAMUEL EVANS, PRESIDENT. Mr. Compston admitted that I need not follow that case. Does *Boger* v. *Boger* (7) throw any light on the present argument?]

The petition was against a Frenchman living in France, and it is covered by the earlier cases of *Grange* v. *Grange and Arendt* (4) and *Gaynor* v. *Gaynor and Degliantoni.* (3)

There is a case on appeal from the King's Bench Division

(1) [1895] A. C. 517.
(2) 20 & 21 Vict. c. 85.
(3) 31 L. J. (P. & M.) 116.
(4) [1892] P. 245.
(5) [1908] P. 256.
(6) [1908] P. 257.
(7) [1908] P. 300.

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which is of considerable importance on this point, *Machado* v. *Fontes* (1), in which *Phillips* v. *Eyre* (2) is cited by Lopes L.J. in dealing with actions for tort committed outside the jurisdiction in the following terms:—"In the case of *Phillips* v. *Eyre* (2) Willes J. lays down very distinctly what the requisites are in order to found such an action. He says this: 'As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been actionable if committed in England . . . . Secondly, the act must not have been justifiable by the law of the place where it was done.'"

The petitioner also relies on the Judgments Extension Act, 1868 (3), under which a judgment in this country for any debt, damages, or costs might be enforced in Scotland or in Ireland against a person domiciled in either of those countries. The true test, it is now submitted, is whether the alleged adulterer is a British subject or a foreigner.

July 4. *Compston* (in reply) referred to Articles XIX. and XXV. of the provisions of the Act for an Union of the Two Kingdoms of England and Scotland. (4)

(1) [1897] 2 Q. B. 231, at p. 233.

(2) (1870) L. R. 6 Q. B. 1, at p. 28.

(3) 31 & 32 Vict. c. 54.

(4) Revised Statutes. 6 Anne, c. 11 [cited as 5 & 6 Anne, c. 8, in the common printed editions]. Articles XIX. and XXV. are as follows:—

(6 Anne, c. 11). (1706). An Act for an Union of the Two Kingdoms of England and Scotland.

Article XIX.: ". . . . And that all other courts now in being within the kingdom of Scotland do remain but subject to alterations by the Parliament of Great Britain and that all inferior courts within the said limits do remain subordinate as they are now to the supreme courts of justice within the same in all time coming. And that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall and that the said courts or any other of the like nature after the union shall have no power to cognosce review or alter the acts or sentences of the judicatures within Scotland or stop the execution of the same . . . ."

Article XXV.: "That all laws and statutes in either kingdom so far as they are contrary to or inconsistent with the terms of these articles or any of them shall from and after the union cease and become void and shall be so declared to be by the respective Parliaments of the said kingdoms."

Scotland claimed the right to deal with all matters affecting her subjects after the Union the same as before, subject to any alterations by the Parliament of Great Britain.

In *Yelverton* v. *Yelverton* (1) Sir Cresswell Cresswell lays it down very broadly that the Matrimonial Causes Act, 1857 (2), extends to England only, and that Scotland is to be deemed a foreign country equally with France or Spain. It is submitted that that is a decisive authority that this Court has no jurisdiction over persons not domiciled in England, and it has not been suggested in the argument on the other side that this Court would not be bound to dismiss a foreigner from the suit if he objected to the jurisdiction.

[SIR SAMUEL EVANS, PRESIDENT. You must not assume for the moment that, if the matter were open to me to decide, I should say that this Court has no jurisdiction over a foreigner.]

Tomkin v. *Tomkin and Another* (3) was a much stronger case than the present one.

[SIR SAMUEL EVANS, PRESIDENT, referred to *Carryer* v. *Carryer and Watson* (4) as being a case in opposition to *Tomkin* v. *Tomkin and Another*. (3)]

By the Companies Act, 1862 (5), s. 127, special provision had to be made to enable the Court to order the examination of persons in Scotland.

The same procedure also exists in bankruptcy. Order XI., r. 1, deals with service out of the jurisdiction, but sub-s. (*e*) exempts the case of a defendant domiciled or ordinarily resident in Scotland or Ireland. Under r. 2, however, "if it shall appear to the Court or judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served."

In *Marshall* v. *Marshall* (6), where the injunction could not, if

(1) 1 Sw. & Tr. 574, at p. 586.
(2) 20 & 21 Vict. c. 85.
(3) (1858) 1 Sw. & Tr. 182.
(4) (1865) 4 Sw. & Tr. 94.
(5) 25 & 26 Vict. c. 89.
(6) (1888) 38 Ch. D. 330.

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it had been granted, have been rendered effective against the defendant, although it might have been against his servants and agents, leave to serve the writ beyond the jurisdiction was refused.

Le Mesurier v. *Le Mesurier and Others* (1) and *Machado* v. *Fontes* (2) do not assist in the present case.

The question in the present case, it is submitted, depends on domicil.

[He also referred to *Watson & Sons* v. *Daily Record (Glasgow), Ld.* (3), *Lenders* v. *Anderson* (4), *Mutzenbecher and Others* v. *La Aseguradora Española* (5), and *Holland* v. *Bennett.* (6)]

The mere presence of a foreigner and the fact that he can be served in this country does not give this Court jurisdiction.

[SIR SAMUEL EVANS, PRESIDENT, referred to Order XI., r. 1 (*g*), which provides for service on a party out of the jurisdiction who is a necessary party to an action within the jurisdiction in the King's Bench and Chancery Divisions, and quoted *Williams* v. *Cartwright and Others* (7) thereon.]

The Judgments Extension Act, 1868 (8), only applies to a judgment in an action which would be legally maintainable in Scotland or Ireland. The suit can be maintained without the presence of the co-respondent.

Barnard, K.C., referred to the Matrimonial Causes Act, 1857 (9), s. 49, which deals with the attendance of witnesses on the Court, and cited *Armytage* v. *Armytage.* (10)

[SIR SAMUEL EVANS, PRESIDENT. Do you think there is any difference here because there is no claim for damages?]

There is no difference.

[SIR SAMUEL EVANS, PRESIDENT, asked whether costs were on the same footing as damages, and referred to ss. 33 and 34 of the Matrimonial Causes Act, 1857. (9)]

Costs are on the same footing as damages. It is in respect

(1) [1895] A. C. 517.
(2) [1897] 2 Q. B. 231.
(3) [1907] 1 K. B. 853.
(4) (1883) 12 Q. B. D. 50.
(5) [1906] 1 K. B. 254.
(6) [1902] 1 K. B. 867.
(7) [1895] 1 Q. B. 142.
(8) 31 & 32 Vict. c. 54.
(9) 20 & 21 Vict. c. 85.
(10) [1898] P. 178.

of his wrong that the co-respondent can be ordered to pay costs.

Cur. adv. vult.

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July 18. In this case the husband's petition, which was dated June 13, 1910, alleged that he was married on August 28, 1902, to the respondent at a register office in Glasgow; that after the marriage he lived with the respondent in Edinburgh and Glasgow and also at two places in England; and that there were two children issue of the marriage aged seven and six respectively. In paragraph 3 of the petition it was stated that the petitioner was a physician and surgeon then resident at a place in Lancashire and that the respondent was then living at a place in Scotland, and that they were both domiciled in England. Paragraph 4 of the petition alleged the respondent committed adultery with the co-respondent in the month of April, 1910, at Glasgow. Paragraph 5 alleged there had been no previous proceedings in this Division with reference to the said marriage, and in paragraph 6 the petitioner made a claim for damages against the co-respondent in respect of the alleged adultery. In the prayer to the petition the petitioner asked that the marriage might be dissolved, that he might have the custody of the two children of the marriage, that the amount of damages might be ascertained by the verdict of a jury, and for a direction as to how such damages should be applied; that the co-respondent might be condemned in the costs of the proceedings; and that the petitioner might have such further and other relief as to the Court might seem meet.

The co-respondent was served with the citation and sealed copy of the petition at his place of residence in Scotland, and an appearance under protest was entered on his behalf by the London agents for his legal adviser in Scotland. The co-respondent now moved to be dismissed from the suit with costs, and in support of the motion an affidavit was filed by the London agent on information conveyed to him by his professional client in Scotland shewing that the parents of the co-respondent were Scotch, that the co-respondent was and always had been domiciled in Scotland, and that he was served there.

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Durley Grazebrook, in support of the motion, at the suggestion of the President, adopted the arguments put forward on behalf of the co-respondent in the case of *Rayment* v. *Rayment and Stuart*, and added that the course now adopted by the present co-respondent was that indicated as the right course to be taken by the judges who decided the cases of *Levy* v. *Levy and De Romance* (1), *Baker* v. *Baker and Dwyer* (2), and *Boger* v. *Boger*. (3) The ex-President (Lord Mersey) had also approved and followed the practice indicated in those decisions in a case which came before him on the application of a petitioner. (4)

Bayford, for the petitioner, adopted the arguments put forward on behalf of the petitioner in *Rayment* v. *Rayment and Stuart*.

Cur. adv. vult.

July 21. SIR SAMUEL EVANS, PRESIDENT. In each of these cases a motion is made on behalf of the co-respondent for an order to dismiss him from the suit on the ground that this Court has no jurisdiction over him.

The suit in each case is brought by the petitioner (the husband), for a decree of dissolution of the marriage with the respondent (the wife), by reason of the adultery of the wife with the co-respondent.

In the first case no damages are claimed against the co-respondent, but the petitioner asks that the co-respondent should be ordered to pay the costs of the proceedings under s. 34 of the Matrimonial Causes Act, 1857.

In the second case damages are claimed against the co-respondent under s. 33 of the same Act, and an order for costs is also asked for against him under s. 34.

The material facts in both cases are similar.

The petitioners and respondents were at the date of the commencement of the proceedings domiciled in England.

The co-respondents were at the same date domiciled in Scotland.

(1) [1908] P. 256.
(2) [1908] P. 257.
(3) [1908] P. 300.
(4) *Hall* v. *Hall* (unreported), February 22, 1909.

The adultery in each case is alleged to have taken place in Scotland.

The co-respondents were served with the petition and citation in Scotland.

The co-respondents entered appearance under protest.

The co-respondent in each case claims to be dismissed from the suit on the ground that he is a domiciled Scotsman, and that, accordingly, he is not subject to the jurisdiction of this Court.

The contention on the part of each co-respondent is that this Court has no jurisdiction over a co-respondent unless he be a domiciled Englishman.

The contention on behalf of each petitioner, on the other hand, is that the co-respondent is a British subject, that this is the test of the jurisdiction of this Court, and that the Court has jurisdiction over every co-respondent who is a British subject.

If the contention of the co-respondents is sound, a Scotsman (or an Irishman) can commit adultery with an English married woman (i.e., a married woman of English domicil) without incurring any liability for damages or costs as a co-respondent in a suit for divorce in England.

It is obvious, therefore, that the question is one of considerable importance.

It was admitted at the Bar that there was no distinction in principle between the two cases, although in the one only an order for costs was asked for, while in the other damages and costs were claimed.

The Matrimonial Causes Act, 1857 (1), only enables this Court to decree the dissolution of a marriage in England, which means, as hereinafter stated, that the Court can only dissolve marriages between persons domiciled in England at the time of the commencement of the proceedings; and for the purposes of divorce, Scotland and Ireland are as much foreign countries as Spain or Italy, and for the same purposes, Scotsmen and Irishmen are regarded and dealt with as foreigners.

Co-respondents in divorce proceedings who are "foreigners,"

(1) 20 & 21 Vict. c. 85.

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i.e., who are not domiciled in England, have been dismissed from dissolution suits in various cases; but it does not appear to me that the point of law now calling for decision upon these two motions has ever been argued in any case in such a way as to make the case a binding authority.

The reported cases are as follows:—

In *Baker* v. *Baker and Dwyer* (1) Bucknill J. dismissed the co-respondent from the suit on the ground that he was a domiciled Irishman. The petitioner, however, did not oppose the application on its merits, but only upon the question of the co-respondent's costs. Bucknill J. dismissed the co-respondent without costs. In this decision the learned judge purported to follow some cases in which the co-respondent had been Italian, German, or French.

In *Gaynor* v. *Gaynor and Degliantoni* (2) the co-respondent was an Italian; he was dismissed from the suit upon the motion of the petitioner, who applied under s. 28 of the Matrimonial Causes Act, 1857 (3), for leave to proceed with the suit as if the co-respondent had not been made a party. The co-respondent, perhaps naturally, did not object, especially as he was given his costs.

In *Grange* v. *Grange and Arendt* (4) the co-respondent was a German. The motion was made on his behalf on the ground of want of jurisdiction. Counsel for the petitioner said, "The petitioner, having regard to the domicil of the co-respondent, has no objection to his being dismissed from the suit, if the Court thinks that the proper course to be pursued." The co-respondent was accordingly dismissed, and received, in the circumstances of that case, the costs of his appearance only.

In *Levy* v. *Levy and De Romance* (5) the co-respondent was a Frenchman. Apparently there was no argument upon the point of jurisdiction, but Bucknill J. dismissed the co-respondent because he was domiciled in France.

In *Boger* v. *Boger* (6) the co-respondent was a Frenchman; leave was given by Bargrave Deane J. to dispense with him

(1) [1908] P. 257.
(2) 31 L. J. (P. & M.) 116.
(3) 20 & 21 Vict. c. 85.
(4) [1892] P. 245.
(5) [1908] P. 256.
(6) [1908] P. 300.

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as a co-respondent, and he was dismissed from the suit "on the understanding that notice of the proceedings was given to him so that he may have the opportunity of clearing himself should he so desire."

In *Fairfax* v. *Fairfax and De la Crux* (1) the co-respondent was a Dane, and was dismissed by Sir Gorell Barnes (President); but the only discussion that took place was on the question of costs.

In *I'Anson* v. *I'Anson and Oldbury* (2), where the alleged domicil of the co-respondent was in New Zealand, the President (Sir Gorell Barnes) doubted how far domicil should determine cases like the above. The case was disposed of, however, on other grounds.

In *Walter* v. *Walter and Bergmann* (3) the co-respondent was a domiciled Austrian. No objection was taken by the petitioner to the motion to dismiss the co-respondent; the question which again arose related to the costs, and Sir John Bigham (President) made the order dismissing him without costs. He appears to have referred to the doubt said to have been entertained by his predecessor as President.

There was another case in which a Scotsman was co-respondent, namely, *Wilson* v. *Wilson and Howell.* (4) The petitioner applied to dismiss him from the suit, and an order was made dismissing him notwithstanding the opposition of the co-respondent himself to be dismissed at that stage. I need not refer to the facts of the case further than to say that it appears from the report that the objection to the jurisdiction, which was taken in the act on petition, was not that the co-respondent's domicil was in Scotland, but that the domicil of the petitioner and respondent was Scotch, and that therefore this Court had no jurisdiction to entertain the suit at all as between any of the parties.

These are all the cases I can find in the reports. If any of them were authorities binding upon me, I should not be troubled to do anything but to follow them loyally; but as they

(1) (1909) Unreported.

(2) Unreported. Sir Gorell Barnes, President, January 11, 1909.

(3) (1909) Unreported.

(4) (1872) L. R. 2 P. & M. 353, at p. 354.

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do not appear so to be, I must deal with the important question raised apart from direct authority.

In all the above cases it was assumed that if the co-respondent was domiciled in a foreign country (Ireland being treated just like Italy or Austria in this respect) either the co-respondent should be dismissed, or leave should be given to proceed with the suit without his being a party.

Mr. Compston, for the co-respondent in the first case, relied on the passage in the judgment of the Judge Ordinary in *Yelverton* v. *Yelverton*. (1) "It is a Court for England, not for the United Kingdom, or for Great Britain; and for the purposes of this question of jurisdiction Ireland and Scotland are to be deemed foreign countries equally with France or Spain."

It will be observed that *Yelverton* v. *Yelverton* (2) was a suit between husband and wife only for restitution of conjugal rights, and the point decided was that, in order that the English Court should have jurisdiction to entertain the suit as between the husband and wife, the parties must be domiciled in England. In cases for restitution, the actual decision in *Yelverton* v. *Yelverton* (2) is not now good law, for residence of the parties within the jurisdiction at the date when the suit is begun (without domicil) is enough: *Thornton* v. *Thornton* (3); *Firebrace* v. *Firebrace* (4); *Le Mesurier* v. *Le Mesurier and Others* (5), per Lord Watson at p. 526. But in any event the observations relied upon had reference, I think, to the marriages in respect of which the Matrimonial Causes Act, 1857 (6), gave the English Court jurisdiction, and do not affect the point now to be decided.

Whatever it is that determines the jurisdiction of this Court with regard to co-respondents, I am of opinion that the jurisdiction does not depend upon the domicil of the co-respondent, as contended by Mr. Compston and Mr. Grazebrook.

But I am also of opinion that the jurisdiction is not to be determined by the question whether the co-respondent is or is not a British subject, as contended by Mr. Barnard and Mr. Bayford.

(1) 1 Sw. & Tr. 574, at p. 586.
(2) 1 Sw. & Tr. 574.
(3) (1886) 11 P. D. 176.
(4) (1878) 4 P. D. 63, at p. 67.
(5) [1895] A. C. 517.
(6) 20 & 21 Vict. c. 85.

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In order to give jurisdiction to this Court to dissolve a marriage, it appears to be now settled that the husband and wife must have an English domicil at the time of the commencement of the proceedings: *Wilson* v. *Wilson* (1); *Le Mesurier* v. *Le Mesurier and Others* (2); subject (semble) to an exception where a wife has been deserted by her husband or is justified by reason of his conduct in living apart from him, and both parties were at the time of the desertion or justification resident in England, and the wife has continued resident in England (see dicta of Sir Gorell Barnes, President, in *Armytage* v. *Armytage* (3)); although I cannot find that the case of *Deck* v. *Deck* (4), which made allegiance the test of jurisdiction, has been expressly overruled; but it is not for me to discuss the authority of this case at the present day.

The jurisdiction over a co-respondent in such proceedings, however, raises a totally different question.

In Scotland, in an action for divorce for adultery, an adulterer may (although he need not) be added as a co-defender (5), and it has been decided that the jurisdiction of the Scotch Courts over the co-defender does not depend upon his domicil, and that they may have jurisdiction over him, though he be not domiciled, or even resident, in Scotland: *Fraser* v. *Fraser and Hibbert.* (6)

In England, however, by the Matrimonial Causes Act, 1857 (7), it is enacted that the adulterer shall be made a co-respondent (s. 28; see also r. 4 of the Divorce Rules, 1865); and it is now settled that he must be added as a co-respondent, whatever his nationality may be, or wherever he may be resident, unless in special cases this Court excuses the petitioner from adding him: *Carryer* v. *Carryer and Watson* (8); *Saunders* v. *Saunders* (9); and see *Wray* v. *Wray and D'Almeida.* (10)

Service of the petition can be effected on the co-respondent in any place, either within or without His Majesty's dominions

(1) (1872) L. R. 2 P. & M. 435, at p. 442.
(2) [1895] A. C. 517.
(3) [1898] P. 178, at p. 185.
(4) (1860) 2 Sw. & Tr. 90.
(5) The Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86), s. 7.
(6) (1870) 8 M. 400.
(7) 20 & 21 Vict. c. 85.
(8) 4 Sw. & Tr. 94.
(9) [1897] P. 89.
(10) [1901] P. 132.

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(s. 42), without any such leave from the Court as is required for the service of writs out of the jurisdiction in the King's Bench and Chancery Divisions.

Any husband may claim damages against "any person" on the ground of his adultery with his wife, either in a petition for dissolution of the marriage, or in a petition limited to the claim for damages only, the damages in all cases to be ascertained by the verdict of a jury (s. 33); and the adulterer if found guilty as co-respondent may, whether damages are claimed or not, be ordered by the Court to pay the costs (s. 34).

This remedy was given to an injured spouse in place of the remedy by action for criminal conversation, which ceased to exist in England after the Act came into operation (s. 59). When the claim is made against a co-respondent, or against the adulterer when not made a co-respondent, "it shall be heard and tried on the same principles, in the same manner, and subject to the same, or the like rules and regulations" as actions for criminal conversation at common law (s. 33). The action of criminal conversation was, of course, an ordinary action for tort, and if it had not been taken away by the Act the Courts here would have inherent jurisdiction over the defendant, altogether irrespective of his domicil, nationality, or residence, if he was in England at the time of the service of the writ, wherever the tort may have been committed, assuming it was an unjustifiable act in the country where the tort complained of was committed: per Lord Lyndhurst in *Warrender* v. *Warrender* (1); and see *Jackson* v. *Spittall* (2); *Phillips* v. *Eyre* (3); *Machado* v. *Fontes*. (4)

If the defendant was a foreigner and abroad, i.e., not in England, at the time of the service of the writ, our Courts would not have inherent jurisdiction over him; but they could exercise assumed jurisdiction, formerly in accordance with the Common Law Procedure Acts, and now under the Judicature Acts, in cases where leave could properly be given to serve the writ out of England.

These cases are now defined by Order xi., r. 1 (*a*) to (*g*). A

(1) (1835) 2 Cl. & F. 488, at p. 562.
(2) (1870) L. R. 5 C. P. 542, at p. 549.
(3) L. R. 6 Q. B. 1.
(4) [1897] 2 Q. B. 231.

defendant in an action of tort may with the leave of the Court be served out of the jurisdiction under Order XI., r. 1 (*c*), and in some cases as a co-defendant under Order XI., r. 1 (*j*): see *Williams* v. *Cartwright and Others*. (1) The rule was made under Act of Parliament, and it creates, as well as defines, the extra-territorial jurisdiction of the Courts to which it applies.

The High Court Rules, however, do not apply in divorce cases in this Division.

The section of the Matrimonial Causes Act, 1857, dealing with the service of the petition has already been referred to (s. 42).

It allows service upon any person at any place, whether within or without His Majesty's dominions; and, as has been pointed out, under the English divorce law, the rule is that a co-respondent must be added as a party, and must be served with the petition and citation.

Various reasons have been given for this provision.

It seems that the provision was intended to be for the benefit partly of petitioners who might claim damages and costs, partly of co-respondents who might wish to clear their character, and partly of the public: see *Wilson* v. *Wilson and Howell* (2); *Carryer* v. *Carryer and Watson* (3); *Saunders* v. *Saunders*. (4)

It is difficult to see how the provision can be of benefit to the petitioner if he must comply with it, and if the co-respondent can nevertheless claim to be dismissed from the suit.

It has been said that s. 42 only serves to facilitate service, and does not create or extend jurisdiction which would not otherwise exist. That may be so as between husband and wife parties to matrimonial suits whose status may be affected. The question remains whether in a divorce suit properly constituted and within the jurisdiction of this Court, so far as the petitioner and respondent are concerned, the co-respondent when a foreigner can be properly brought within the jurisdiction in the same proceedings.

It would be strange if, after the petitioner was necessarily put to great difficulty and expense in effecting service upon co-respondents in distant parts of the globe (which the law says he must

(1) [1895] 1 Q. B. 142.
(2) L. R. 2 P. & M. 353.
(3) 4 Sw. & Tr. 94.
(4) [1897] P. 89.

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do), all that those co-respondents—if not domiciled in England—need do is to appear under protest, and instruct some one here to apply to have them dismissed from the suit, and to obtain an order for their costs.

I am aware that a citation in divorce proceedings and a writ in an action are not the same thing, but I think that, so far as the co-respondent is concerned, the citation corresponds with what would have been the writ in an action for criminal conversation.

It is issued in the name of His Majesty the King, and directed to the co-respondent, and, after reciting the petition for the dissolution of the marriage and the allegation of the co-respondent's adultery, it commands the co-respondent to appear in this Court and to make answer to the petition, and it states that, in default of the co-respondent appearing and answering, this Court will proceed to hear the charge in due course of law and to pronounce sentence therein, notwithstanding the co-respondent's absence.

I see no reason why the service of the petition and citation upon him, if out of England, should not place him on a similar footing with regard to jurisdiction as a defendant properly served with a writ out of the jurisdiction under Order XI. in the King's Bench or Chancery Division. If not, what substitute has a wronged husband got in this country for the remedy by action in England for criminal conversation, which was taken away from him by the Act of 1857?

It is the rule (Order XI., r. 1) already referred to, made under and with the force of a statute, which gives authority to the King's Bench and Chancery Divisions of the High Court in this country to give leave to effect service of process abroad, even on foreigners in the cases specified in the rule, and which thereby gives the Court jurisdiction over the persons so served. "If service of the process of the Court is necessary for the jurisdiction of the Court, the Court cannot, except so far as it is authorized by statute, order service abroad. The effect of a statute which gives it that power does not affect, of course, the laws of other countries or the questions of international law which may be raised; but, as far as the Courts of this country are concerned, the statutes of the realm are supreme; and if the

statute says that the Court shall have jurisdiction over a foreigner if service is effected in a particular way abroad, then the Courts of this country will give effect to that statute": per Bowen L.J. in *In re King & Co.'s Trade Mark.* (1)

The statute conferring divorce jurisdiction upon this Court provides not only that "*any person*" who is alleged to be an adulterer may, but that he must, be served, and it authorizes service upon him at any place at home or abroad.

There is no doubt as to the competence of the Legislature to provide for service of the process of our Courts abroad, either upon British subjects or upon foreigners. In *Ashbury* v. *Ellis* (2) it was decided that a colony (New Zealand) could, under its constitutional law, make such a provision. Lord Hobhouse, in giving the decision of the Privy Council, said: "It is not contended that the rules in question are repugnant to the laws of England. In fact, they are framed on principles adopted in England. . . . . So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof, in proper cases the English Courts have it conferred on them by the Imperial Parliament"; and he went on to say that the question whether a judgment obtained after service of such process outside the jurisdiction would be treated by a foreign country as a valid foreign judgment, or whether it could be enforced in a foreign country, was not relevant to the question of the validity of the judgment following such process in the colony where it was permitted. So in *Drummond* v. *Drummond* (3), where the question raised was as to the validity of rules and orders made for service out of the jurisdiction under 3 & 4 Vict. c. 94, Lord Chelmsford said, "The Legislature of every country has power to regulate the course of proceeding in its own Courts"; and Turner L.J. said, "The question in this case, as I view it, is not against whom, or under what circumstances, or with relation to what property, the Legislature of a country may be justified in authorizing the process of its Courts to be served out of the jurisdiction of those Courts, but whether the

(1) [1892] 2 Ch. 462, at p. 483.
(2) [1893] A. C. 339, at pp. 341 and 344.
(3) (1866) L. R. 2 Ch. 32, at pp. 37 and 46.

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Legislature of this country has not in fact authorized the process of this Court to be so served."

The claim against the co-respondent is merely a money claim, a personal claim, or, as it is sometimes called, a transitory claim. There is no complication arising from questions of international law, as there is where the status of persons under marriage laws is concerned. Any judgment of the Court (apart from a possible extension to Scotland or Ireland, as hereafter pointed out) would not be executed or attempted to be executed in any foreign country. "The question what jurisdiction can be exercised by the Courts of any country according to its municipal law cannot be conclusively determined by a reference to principles of international law. No nation can execute its judgments, whether against persons or movables or real property, in the country of another": per Lord Herschell in *British South Africa Co.* v. *Companhia de Moçambique.* (1)

The enactment in s. 42 of the Act providing for service of "any person" at "any place" is only a municipal law in favour of those who sue in this Court. The Legislature in making this provision does not concern itself with the question whether an order against a co-respondent for payment of damages or costs in a proceeding begun by a citation served abroad would be enforceable as a foreign judgment in another country.

It may or may not be so enforceable. The object of the provision is that this Court itself may make the order, and enforce it against any property which the person against whom the order is made may have within its own reach and in its own jurisdiction : cf. per Blackburn J. in *Schibsby* v. *Westenholz and Others.* (2)

It may very well be that this Court would have discretionary power to dismiss the co-respondent in any suit, just as it can dispense with him altogether (see ss. 28 and 42), and that it would exercise that power if it were apparent that any judgment or order as to damages or costs would be ineffective.

As a general rule the Courts of this country will exercise jurisdiction over a matter in which they can make their judgments effective, and will refrain from exercising it where the

(1) [1893] A. C. 602, at p. 624. (2) (1870) L. R. 6 Q. B. 155, at p. 163.

judgments will be ineffective: see this doctrine discussed in Mr. Dicey's Conflict of Laws, 2nd ed., pp. 40—58.

With regard to Scotland and Ireland, an order made in this Court for damages or costs might be (it is not necessary now to decide that it could be) extended so as to be made effective in those two countries under the Judgments Extension Act, 1868: see *In re Binstead, Ex parte Dale* (1); *In re Hallman, Ex parte Ellis and Collier*. (2) I see no reason why it should not be so extended.

But suppose a Scotsman, or an Irishman, or a Russian, or an American, or a Mexican, had large properties in England, although not domiciled or even ordinarily resident here, if the Court can retain him as a co-respondent, and if after a trial his guilt was established, its order might be made effective by a fi. fa., or a writ of sequestration, or in some other legitimate way in this country.

I think that as the Act gives power to serve anybody as co-respondent anywhere, it gives jurisdiction to make an order against him, and to issue process of execution to enforce the order in this country, which can be done without in any way affecting any international comity or offending any international susceptibilities.

"The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit": per Lindley M.R. in *Pemberton* v. *Hughes*. (3)

For the reasons I have given, the co-respondents have failed to satisfy me that their Scotch domicil frees them from being made answerable in this Court for making some compensation for their wrong, if the cases are established against them. The arguments of their counsel have not convinced me that the law of England is that a man of any nationality who is not domiciled in England has the legal right to say to a petitioner whose matrimonial remedies can only be pursued in this Court, "I know your home was happy, and your wife was pure before I left my foreign domicil to pursue her; it is true that I debauched her, and destroyed your home; by all means file your petition against

(1) [1893] 1 Q. B. 199, at p. 207. (2) [1909] 2 K. B. 430.
(3) [1899] 1 Ch. 781, at p. 792.

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your wife, and get rid of her; but take care, you must first go to the trouble and expense of serving me with your petition and with a citation, wherever I may happen to be; otherwise I shall not be able to ask the Court to dismiss me from the suit, or to condemn you in the costs of my application; but I promise you that after you serve me, I will at once claim the right to be dismissed. For the rest, if you are not content, it may be that you may have some sort of remedy against me outside England—in Russia, or the United States of America, or Mexico, or elsewhere; so you may leave your home and your business and run over for some months to the country in which I may be domiciled and try your luck in the appropriate Courts if you can find them."

The conclusions at which I have arrived after some perplexity and difficulty are as follows:—

The jurisdiction of the Court over the co-respondent, both as to damages and costs, in a suit properly instituted here, does not depend on domicil, allegiance, or residence.

If a foreign co-respondent is served in England, this Court has for that reason jurisdiction over him.

He can be served abroad, whatever his nationality, and if he is served abroad, the statute authorizing such service gives to this Court jurisdiction over him.

In proper cases this Court may exercise discretionary power, and dismiss, or dispense with, a co-respondent domiciled abroad, but he is not entitled to demand as of right that he be dismissed from the suit.

By these motions the co-respondents, Scotsmen, make that demand.

Until some higher Court decides that this demand can be made as of right, I must, on the view I take of the law, decline to accede to it, and I dismiss both motions with costs.

Solicitors in *Rayment* v. *Rayment and Stuart*: For the co-respondent, *Wrensted, Hind & Roberts;* for the petitioner, *Warren & Warren.*

Solicitors in *Chapman* v. *Chapman and Buist*: For the co-respondent, *Arber & Lewis;* for the petitioner, *R. H. S. Butterworth.*

H. D. G.

[DIVISIONAL COURT.]

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THE PORTSMOUTH.

Admiralty—Ship—Bill of Lading—Incorporation of Conditions of Charterparty—Demurrage—Arbitration Clause.

Goods were shipped under a bill of lading by which they were deliverable to the shipper or to his assigns, "he or they paying freight for the said goods with other conditions as per charterparty," and in the margin was written in ink "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charterparty including negligence clause."

The charterparty provided that the cargo should be discharged by the steamer at port of destination, in the usual manner, with customary steamer despatch, according to the custom of the port, "but if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and "Any dispute or claim arising out of any of the conditions of this charterparty shall be adjusted at port where it occurs, and same shall be settled by arbitration":—

Held by a Divisional Court (Sir Samuel Evans, President, and Bargrave Deane J.), affirming an order of a county court judge, that all proceedings must be stayed in an action, commenced in the county court by the shipowner against the holder for value of the bill of lading, for demurrage alleged to have been incurred at the port of discharge, as the arbitration clause in the charterparty was incorporated in the bill of lading.

Hamilton v. *Mackie*, (1889) 5 Times L. R. 677, distinguished.

Appeal by plaintiffs, the Portsea Steamship Company, Limited, of Cardiff, shipowners, from an order of the judge of the Cardiff County Court staying their action for demurrage against the defendants, T. W. Thomas & Co., Limited, timber merchants, of Swansea, on the ground that the matter in dispute was within a submission to arbitration contained in the charterparty and incorporated by reference in the bill of lading under which the goods were carried.

On April 26, 1910, the plaintiffs, as owners of the steamship *Portsmouth*, commenced an action in the Cardiff County Court (admiralty jurisdiction) against the defendants, the holders of the bill of lading and consignees of cargo, for 200*l.* in respect of "a claim arising out of an agreement made in relation to the

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use or hire of the steamship *Portsmouth* and in relation to the carriage of goods on board the said steamship." By their particulars the plaintiffs demanded payment of the 200*l.* as "eight days demurrage of the steamship *Portsmouth* at 25*l.* a day under bill of lading dated November 29, 1909."

The bill of lading was in respect of the carriage of a cargo of timber from Parrsboro Roads, N.S., to Swansea, shipped by W. Malcolm Mackay, and deliverable to the shipper or to his assigns, "he or they paying freight for the said goods with other conditions as per charterparty," and in the margin was written in ink "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charterparty including negligence clause."

The charterparty, dated January 14, 1909, and signed in Liverpool by Henry Lloyd & Co., brokers, as agents for the owners of the *Portsmouth*, and A. F. & D. Mackay, as agents for C. J. White & Sons, Limited, of Alma, N.B., merchants, provided, inter alia, for discharge of the timber by the steamer at port of destination in the usual manner, with customary steamer despatch according to the custom of the port, "but if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and also contained the following clause: "Any dispute or claim arising out of any of the conditions of this charterparty shall be adjusted at port where it occurs, and same shall be settled by arbitration."

On May 2, 1910, the defendants, relying upon the reference to arbitration contained in the charterparty, entered an appearance to the action under protest, and, in support of an application under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), to stay proceedings, filed an affidavit in which they set out the material portions of the correspondence between the respective solicitors (sufficiently referred to in the judgment of Bargrave Deane J.) as to the appointment of arbitrators.

On May 5, the learned county court judge made an order staying all proceedings in the action between the plaintiffs and the defendants, with costs against the plaintiffs, on the ground that the arbitration clause in the charterparty was incorporated

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in the bill of lading, and in the course of his judgment said that the question arose under the charterparty, "and it is to the charterparty you must look to see what demurrage is due, and for what reason the demurrage becomes due, and what the liabilities of the persons charged with it are."

The plaintiffs appealed on the ground that the learned county court judge was wrong in law (1.) in holding that the arbitration clause contained in the charterparty was incorporated in the bill of lading, (2.) in holding that the plaintiffs were not entitled to proceed with their action against the defendants for demurrage incurred in the discharge of the cargo, but were bound to resort to arbitration, and (3.) in holding that the provisions of the Arbitration Act, 1889, s. 4, applied so as to bar the plaintiffs from pursuing their remedy for such demurrage by action at law.

1910, July 19. *Bailhache, K.C.*, and *D. W. Carr*, for the appellants (plaintiffs), owners of the *Portsmouth*.

Leslie Scott, K.C., and *Holman Gregory*, for the respondents (defendants), holders for value of the bill of lading.

The arguments of counsel sufficiently appear from the considered judgment of the President. In addition to the cases and text-book therein mentioned the following were referred to by counsel for the appellants: *Fry* v. *Chartered Mercantile Bank of India* (1); *Manchester Trust* v. *Furness* (2); *Krüger & Co., Ld.* v. *Moel Tryvan Ship Co., Ld.* (3); *The Draupner* (4); Scrutton on Charterparties and Bills of Lading, 5th ed. (1904), pp. 49, 50. By counsel for the respondents: *Diederichsen* v. *Farquharson*. (5)

Cur. adv. vult.

July 27. THE PRESIDENT (SIR SAMUEL EVANS). The short question raised by this appeal is whether the plaintiffs' claim for demurrage under a bill of lading is a claim to which the arbitration clause contained in the charterparty applies.

(1) (1866) L. R. 1 C. P. 689.
(2) [1895] 2 Q. B. 282, 539.
(3) [1907] A. C. 272.
(4) [1909] P. 219; [1910] A. C. 450.
(5) [1898] 1 Q. B. 150.

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The plaintiffs are the owners of the vessel; the defendants are the holders for value of the bill of lading. The demurrage claimed is 200*l.*, being eight days at the rate of 25*l.* per day. In the proceedings the plaintiffs put the claim forward as a fixed sum of 200*l.*, "arising out of an agreement made in relation to the use or hire of the steamship *Portsmouth*, and in relation to the carriage of goods on board the said steamship." As throwing some light upon how the question is regarded in the commercial and shipping communities, I may note that before action the plaintiffs, through well-known shipping solicitors, demanded arbitration under the clause; but a dispute as to the personnel of the arbitrators supervened. This, however, does not affect the question of law.

The bill of lading does not fix the rate of demurrage, but it contains the usual provision "he or they paying freight for the said goods with other conditions as per charterparty," and in the margin, "all other terms and conditions and exceptions of charter to be as per charterparty including negligence clause." The rate of demurrage is fixed by the charterparty as follows: "But if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of 25*l.* per day." The same clause contains various terms, conditions, and exceptions which would require to be considered in determining whether any, and, if so, how many days, demurrage was payable. The arbitration clause in the charterparty reads thus: "Any dispute or claim arising out of any of the conditions of this charterparty shall be adjusted at port where it occurs, and same shall be settled by arbitration."

We were referred to various cases and text-books, all of which I have carefully considered. The principle which has been generally accepted in all the cases is stated by Willes J. in *Russell* v. *Niemann* (1): "(The question) depends upon whether the words 'and other conditions as per charterparty' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods. It is a mere question of language and construction; and we think it enough to say

(1) (1864) 17 C. B. (N.S.) 163, at p. 177.

that the latter is the construction which we put upon these words." These words were expanded or explained by Lord Blackburn in an unreported case of *Taylor* v. *Perrin* in the House of Lords, in the following passage:—"The case which has been referred to—*Russell* v. *Niemann* (1)—in which Willes J. gave judgment, as it appears to me perfectly correctly decided that the reference to the charterparty is meant to bring in those conditions which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on; but is by no means to be taken to incorporate all the conditions of the charterparty." (quoted per Lopes L.J. in *Serraino* v. *Campbell* (2)).

It appears to me that if the words "the ascertainment of the amount of the demurrage or freight" were inserted after the word "freight" in the above passage it would be equally accurate; and, if so, it would apply directly to the present case. Lord Esher has said that the words mean that you must read the conditions of the charterparty verbatim into the bill of lading, as though they were printed in extenso, and then disregard such as were inconsistent with the bill of lading. Mathew L.J., in *East Yorkshire Steamship Co.* v. *Hancock* (3), states the effect of the decisions thus: "The only provisions of the charterparty which are not incorporated into the bill of lading are those which are not clearly relevant to conditions which have to be performed by the consignee on the arrival of the ship."

We were pressed by counsel for the appellants with the decision in *Hamilton* v. *Mackie* (4), and, if the facts were the same, that case would, of course, bind us. It related to an arbitration clause. The case is very shortly reported. I have done my best to obtain a copy of the record, and the documents, but without success. It appears from the short report that "the action was brought for the balance of the bill of lading freight"; that the charterparty provided that "all disputes under this charter shall be referred to arbitration"; and that on the bill of lading were stamped the words "all other terms

(1) 17 C. B. (N.S.) 163.
(2) [1891] 1 Q. B. 283, at p. 295.
(3) (1900) 5 Com. Cas. 266, at p. 268.
(4) 5 Times L. R. 677.

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and conditions as per charterparty." The Master of the Rolls said it was clear that the condition as to arbitration did not refer to disputes arising under the bill of lading, but to disputes arising under the charterparty. Lord Collins explains that decision in *Temperley Steam Shipping Co.* v. *Smyth* (1) thus: "He (Lord Esher) treats the dispute in that case as arising *exclusively* under the bill of lading, and *not* under the charterparty, and therefore as not covered by the clause which related to disputes under the charter *only*." The italics are mine. I agree with the late Judge Carver that "the context must in each case be looked at" (par. 160, 5th ed. (1909) of Carriage of Goods by Sea). As was said by Willes J., it is a mere question of language and construction in each case.

In this case the arbitration clause refers not to disputes under the charterparty only, but to "any dispute or claim arising out of any of the conditions" of the charterparty. The action is brought for demurrage fixed by the charterparty. How many days demurrage is payable, and in what circumstances it is recoverable, depends upon the terms and conditions of the demurrage clause in the charterparty; in other words, the charterparty must be referred to in order to ascertain the amount and the conditions of liability. The dispute or claim in this case arises out of those conditions, and accordingly is a dispute or claim coming literally and expressly within the arbitration clause. Suppose the words "any dispute or claim arising out of any of the conditions of this clause shall be settled by arbitration" were added, so as to form part of the demurrage clause itself; I think it pretty clear that this claim would come within that provision. It cannot make any difference that the words form a separate clause by themselves.

I think, therefore, that the arbitration clause applies to the claim in this action, and that this appeal fails.

BARGRAVE DEANE J. I am of the same opinion, but I want to add a word or two on the question of fact.

It is remarkable that when the plaintiffs' solicitors applied for a summons in the county court they said it was a claim "arising

(1) [1905] 2 K. B. 791, at p. 801.

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out of an agreement made in relation to the use or hire of the steamship *Portsmouth*, and in relation to the carriage of goods on board the said steamship." This is repeated in the affidavit, for leave to issue the summons against the defendants out of the district, made by Mr. Hinde, one of the managers and directors of the plaintiff company. He says, "for a claim arising out of an agreement made in relation to the use or hire of the steamship *Portsmouth*, and in relation to the carriage of goods on board the said steamship." Upon that an order was made for particulars, and then you find a difference, because you find a claim for "eight days demurrage of the steamship *Portsmouth* at 25*l.* per day under bill of lading, dated the 29th day of November, 1909." Well, there is nothing in the bill of lading which refers to 25*l.* per day demurrage, and therefore you must look back to the charterparty to see what the claim is and how it is framed.

Before the case came into Court the plaintiffs themselves claimed that there should be an arbitration and suggested the names of gentlemen who should arbitrate in accordance with the terms of the charterparty. The matter went on in discussion between the plaintiffs and defendants as to who should be the arbitrator, and it was not a dispute as to whether there should be an arbitration. It is perfectly clear that at the beginning the plaintiffs themselves were the persons wanting an arbitration, pursuant to the terms of the charterparty.

In my opinion, apart from the question of law, which the President has dealt with, the facts are conclusive against the plaintiffs in respect of the matter being tried by arbitration. They admitted at one time that it was a matter which should be submitted to arbitration. Now, when it does not suit their purpose to agree to the arbitrator, they fall back upon the point of law which my Lord has pointed out is against them. In my opinion, both on law and fact, the plaintiffs fail.

Appeal dismissed with costs.

Solicitors for appellants (plaintiffs): *Downing & Handcock, Cardiff.*

Solicitors for respondents (defendants): *Vaughan & Roche, Cardiff, for James D. Rawlings, Swansea.*

T. L. M.

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July 20.

[IN THE CHANCERY COURT OF YORK.]

The Office of the Judge promoted by BOWMAN *v.* LAX.

Ecclesiastical Law—Jurisdiction—Church Discipline Act, 1840 (3 & 4 *Vict. c.* 86), *s.* 3—*Criminal Suit by Letters of Request—Incumbent "concerning whom there may exist scandal or evil report as having offended against the laws ecclesiastical"—Application for Admission of Articles charging Offence of occasioning Scandal by Immoral Acts justiciable under the Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32)—*Rejection of Articles—Citation—Description of Judge in Citation as "Official Principal and Auditor of the Chancery Court of York"—Objection to Style of Judge not sustained.*

The offence of occasioning scandal within the 3rd section of the Church Discipline Act, 1840, cannot be entertained in a criminal suit by Letters of Request under that Act against a clerk in holy orders of the Church of England in any case where the acts which appear to have occasioned the scandal are immoral acts within the 75th Canon of 1603 and constitute an offence in respect of which the respondent has not been proved guilty; the Courts appointed to have jurisdiction under the Clergy Discipline Act, 1892, being the only Ecclesiastical Courts having jurisdiction to inquire as to the truth of the immoral acts or offences so occasioning the scandal.

The 3rd section of the Church Discipline Act, 1840, read with the 13th section of the same Act, provides that in every case of any clerk in holy orders of the Church of England who may be charged with any offence against the laws ecclesiastical or concerning whom there may exist scandal or evil report as having offended against the laws ecclesiastical it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment to—in the circumstances mentioned in the last-mentioned section—send the case by Letters of Request to the Court of Appeal of the province, to be there heard and determined according to the law and practice of that Court.

The 2nd section of the Clergy Discipline Act, 1892, read with the 12th section of that Act, provides, inter alia, that if a clergyman in holy orders in the Church of England is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and not being a question of doctrine or ritual, he may be prosecuted under that Act (subject to the disallowance by the bishop of the diocese of vague and frivolous charges); the expressions immoral act, immoral conduct, and immoral habit including such acts, conduct, and habits as are proscribed by the 75th and 109th Canons of 1603. By the 14th section of the same Act, the Church Discipline Act, 1840, except certain sections as to procedure not material to this case, shall be repealed as respects any proceeding instituted after the passing of the

Act of 1892 for an offence which can be prosecuted under that Act. The articles brought in in a criminal suit by Letters of Request sent to the Chancery Court of York by one of the bishops of the Northern Province under the 13th section of the Church Discipline Act, 1840, alleged, inter alia, that by the laws, constitutions, and canons ecclesiastical of this realm, and more particularly by virtue of the 75th Canon of 1603, moral life and sober conversation are required in ministers, who shall have always in mind that they ought to excel all others in purity of life and should be examples to the people to live well and christianly under pain of ecclesiastical censures; that during the period of two years next preceding the commencement of the proceedings in the suit there had been concerning the respondent, a clergyman in holy orders of the Church of England and the incumbent of a living in the diocese of the bishop signing the Letters of Request, scandal or evil report as having offended against the laws ecclesiastical above mentioned; and that the promoter would pray that on due proof of the premises the respondent should be deprived ab officio et a beneficio or be otherwise canonically punished. The promoter applied that the articles so brought in might be admitted to proof.

The judge of the Chancery Court of York refused to admit any of the articles, being of opinion that the offence of scandal with which it was sought to charge the respondent could not be adjudicated upon by the Court, inasmuch as such scandal was not cognizable apart from the acts which caused the scandal, which acts constituted offences under the Clergy Discipline Act, 1892, and could not be dealt with under the Church Discipline Act, 1840.

THIS case came before the Court by virtue of Letters of Request signed by the Bishop of Carlisle, under the 13th section of the Church Discipline Act, 1840, after a commission under that Act had reported that there were sufficient prima facie grounds for instituting further proceedings against the respondent, the Reverend John George Lax, clerk in holy orders of the Church of England and vicar or perpetual curate of the parochial chapelry of Stainmore in the county of Westmoreland and diocese of Carlisle and Province of York.

The Letters of Request, which were dated May 23 last, contained, inter alia, a recital that complaint had been made to the Bishop of Carlisle that scandal or evil report existed concerning the respondent as having offended against the laws ecclesiastical by his having been guilty of conduct unbecoming a clerk in holy orders and as tending to evil example and impurity of life, and concluded by requesting "The Right Worshipful Sir Lewis Tonna Dibdin, D.C.L., Official Principal and Auditor of the

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Chancery Court of York, lawfully constituted your surrogate, or other competent judge," to issue a citation or decree under the seal of the said Court calling upon the said J. G. Lax to appear . . . . and to answer to certain articles . . . . touching and concerning . . . . the lawful correction and reformation of his manners and excesses, "and more especially for having within two years last past been guilty of having meetings on many occasions with one A. B. in the church of Stainmore and elsewhere in the neighbourhood of Stainmore." [The Letters of Request then specified the other acts and matters in respect of which the respondent was alleged to have been guilty as the same are set out below in the citation in the cause, and continued:] "and by reason of the premises having brought great scandal on the Church to be administered to him at the voluntary promotion of Anthony Nichol Bowman of the city of Carlisle gentleman to hear and determine the said cause according to the laws and practice of the said Court."

The Letters of Request were accepted by one of the surrogates of the Court, and on June 16 last a citation or decree in the cause issued from the registry. By the terms of this citation the Right Worshipful Sir Lewis Tonna Dibdin, D.C.L., described therein as "Official Principal and Auditor of the Chancery Court of the Most Reverend Father in God Cosmo Gordon Lord Archbishop of York Primate of England and Metropolitan lawfully constituted," authorized, empowered, and strictly enjoined all singular clerks and literate persons whomsoever and wheresoever in and throughout the whole Province of York jointly and severally to cite or cause to be cited the said Reverend J. G. Lax to appear personally or by his proctor duly authorized "before us or our lawful representative in the Consistory place within the Cathedral and Metropolitan Church of St. Peter of York on Wednesday being the 29th day of June instant between the hours of 8 and 12 in the forenoon of the same day and then and there to abide if occasion require during the sittings of the Court then and there to answer to certain articles . . . . touching . . . . the lawful correction and reformation of his manners and excesses and more especially for having within two years last past been guilty of having meetings on many occasions with one A. B. in the church of Stainmore

and elsewhere in the neighbourhood of Stainmore in the said diocese of Carlisle and walked and consorted with the said A. B. in a manner such as to cause scandal concerning the said A. B. and by reason of the premises having brought great scandal on the Church to be administered to him by virtue of our office at the voluntary promotion of the said Anthony Nichol Bowman and further to do and receive as unto law and justice shall appertain under pain of the law and contempt thereof at the voluntary promotion of the said Anthony Nichol Bowman . . . ."

The citation was personally served on the respondent on June 18 last, and on or about June 27 last the articles in the cause were brought in. Of these articles, articles 2 to 9 were to the effect following:—

2. "These proceedings are taken against the respondent in accordance with the provisions of the Church Discipline Act, 1840, section 3 whereof provides inter alia that in every case of a clerk in holy orders of the Church of England concerning whom there may exist scandal or evil report as having offended against the laws ecclesiastical it shall be lawful for the bishop of the diocese in the manner therein provided to issue a commission under his hand and seal to five persons for the purpose of making inquiry as to the grounds of such report."

3. "On the 24th of December, 1909, the Bishop of Carlisle duly issued a commission under his hand and seal to five persons in manner provided by the said Act which commission after reciting that there existed scandal and evil report concerning the respondent as having offended against the laws ecclesiastical therein mentioned was expressed to be for the purpose of making inquiry as to the grounds of the said report."

4. "By the laws statutes constitutions and canons ecclesiastical of this realm and more particularly by virtue of the 75th Canon of 1603 moral life and sober conversation are required in ministers who shall have always in mind that they ought to excel all others in purity of life and should be examples to the people to live well and christianly under pain of ecclesiastical censures to be inflicted with severity according to the qualities of their offences."

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5. "By the vows which each minister takes at his ordination he must be diligent to frame and fashion himself and his family according to the doctrine of Christ and to make both himself and them as much as in him lieth wholesome examples and patterns to the flock of Christ. The respondent duly took the said vows at the time of his ordination."

6. "The commissioners appointed under the said commission did on the 6th of January, 1910, duly assemble and examine all witnesses who were tendered to them for the purpose of fully prosecuting the inquiry and ascertaining whether there was sufficient prima facie ground for instituting further proceedings and after due consideration of the depositions taken before them one of the said commissioners did openly and publicly declare the opinion of them all that there was sufficient prima facie ground for instituting further proceedings against the respondent."

7. [Alleged that the depositions above referred to and the report of the opinion of the commissioners had been duly transmitted to the Bishop of Carlisle in manner required by s. 5 of the Church Discipline Act, 1840.]

8. [Contained a statement that the case had been sent to this Court by Letters of Request.]

9. "During the period of two years next preceding the commencement of proceedings in this cause there has been and now is concerning the respondent scandal or evil report as having offended against the said laws ecclesiastical above mentioned in each of the paragraphs 4 and 5 and either of them. Particulars of the said scandal and evil report are comprised in the following paragraphs."

Of the remaining articles material to this report, articles 10, 13, and 16 set out the particulars of the alleged acts and conduct of the respondent specified in the recitals of the Letters of Request and in the citation and alleged by the promoter to have occasioned the scandal and evil report alleged to exist concerning the respondent. These particulars so far as material to this report are referred to in detail in the judgment.

Article 11 charged that the respondent was at the time of the

events above mentioned a married man and that by his conduct in the matters referred to in paragraph 10 he has occasioned scandal and evil report concerning himself and the said A. B., whilst article 14 alleged that on September 27, 1909, eight of the young men of the parish were convicted at Kirkby Stephen police court of an assault upon the respondent by reason of the matters referred to in paragraph 12 of the articles.

The 19th and 20th articles were in substance as follows:—

19. "By virtue of the premises and the said Letters of Request the respondent is subject to the jurisdiction of this Court."

20. "On due proof of the premises the promoter will pray that the respondent be deprived ab officio et a beneficio or be otherwise punished according to the gravity of his offence and the exigency of the law and be admonished from so offending in future and condemned in the costs of these proceedings."

A written statement of objections to the citation was handed in to the registry by the respondent on June 29 last. In this statement of objections the respondent alleged that he was entitled to be dismissed from the suit by reason of defects in the citation, one such defect being that the proper judge to issue the citation and try the cause was the Vicar-General of the Archbishop of York, and another defect being that the judge issuing the citation was improperly described therein as the Official Principal *and* Auditor of the Chancery Court of the Most Reverend Cosmo Gordon, Lord Archbishop of York, whilst he should have been described as Official Principal *or* Auditor of the Chancery Court of York.

July 20, 1910. A motion on behalf of the promoter for the admission of the articles now came on to be heard before the judge of the Chancery Court of York (Sir Lewis Tonna Dibdin, D.C.L.).

Montague Barlow appeared for the promoter.

The respondent appeared in person.

The respondent raised a preliminary objection that Sir Lewis Dibdin had no jurisdiction to entertain the motion. The description of the judge in the citation as Official Principal *and* Auditor

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of the Chancery Court of York was wrong and vitiated the citation and all subsequent proceedings in the suit. [He referred to the statement of written objections he had handed in to the registry and to the following cases:—*Thorpe* v. *Mansell* (1); *Williams* v. *Bott.* (2)] The proper style of the judge in the citation should have been "Official Principal *or* Auditor," as appears from the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85).

The objection in the statement of objections that the proper judge to entertain the cause was the Vicar-General of the Archbishop of York was withdrawn by the respondent.

Barlow, for the promoter. First as to the preliminary objection to the jurisdiction raised by the respondent. The citation describes the judge of the Chancery Court of York with sufficient clearness, and as the respondent is now present, he can have had no doubt before what judge he was cited. The Ecclesiastical Courts are not willing to allow mere technical errors of description to vitiate the proceedings: *Prankhard* v. *Deacle* (3); *Maidman* v. *Malpas.* (4) The case of *Williams* v. *Bott* (2) is distinguishable from the present case. There the party was cited before the proper judge, but the copy of the articles delivered to the party was in the name of the predecessor of that judge.

[THE JUDGE OF THE CHANCERY COURT OF YORK. I do not think I need trouble you further as to the respondent's objection to the citation. Your motion, however, is to admit the articles, but first I want you to satisfy me that I have jurisdiction at all to entertain this cause, the proceedings being under the Church Discipline Act, 1840, and not under the Clergy Discipline Act, 1892.]

The only offence charged against the respondent in the articles is the offence of having occasioned scandal or evil report concerning himself in having offended against the laws ecclesiastical, and that offence is now only justiciable under the 3rd section of the Church Discipline Act, 1840 (5), under which Act, and not

(1) (1810) 1 Cons. 4, n.
(2) (1789) 1 Cons. 1.
(3) (1828) 1 Hagg. 169.
(4) (1794) 1 Con. 205.
(5) The 3rd section of the Church Discipline Act, 1840, provides, inter alia, as follows: "In every case of any clerk in holy orders of the Church of England who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or

under the Clergy Discipline Act, 1892, this suit has been rightly brought: *Borough* v. *Collins* (1); *The Office of the Judge promoted by the Bishop of Rochester* v. *Harris*. (2)

[THE JUDGE OF THE CHANCERY COURT OF YORK. The proper construction of the 3rd section of the Church Discipline Act, 1840, may be that occasioning scandal or evil report is not constituted a substantive offence, but that the scandal or evil report is to be brought to the notice of the bishop, who is to determine whether he will issue a commission to inquire if the respondent has been prima facie guilty of offences against ecclesiastical law which may give rise to the scandal. In fact "scandal" may be merely a means of setting the Act in motion.]

Occasioning scandal has been held to be a substantive offence cognizable under the section cited apart from the proof of any other offence against the laws ecclesiastical: *Borough* v. *Collins* (1); *The Office of the Judge promoted by the Bishop of Rochester* v. *Harris* (2); and the offence has this peculiarity attaching to it, that as scandal in the case of a clergyman impedes the work of the Church, whether in fact the clergyman has committed any offence giving rise to the scandal or not, the Ecclesiastical Court does not punish the offence of scandal, but removes the cause of the scandal: *The Case of the Dean of Jersey*. (3) I should therefore be entitled to proceed against the respondent for the offence of occasioning scandal against the laws ecclesiastical on giving proof of the scandal without offering any evidence which would constitute any substantive offence against him giving rise to the scandal. In the present case, however, the articles allege not only the existence of scandal concerning the respondent, but also the offences against

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evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report . . . ."

(1) (1890) 15 P. D. 81.

(2) [1893] P. 137, at p. 141.

(3) (1840) 3 Moo. P. C. 229, at p. 244.

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ecclesiastical law which have given the grounds for such scandal existing. These offences, namely, the acts of impropriety with a female alleged against the respondent, are no doubt similar offences to those referred to in the 75th Canon of 1603, but do not amount to "immoral acts," "immoral conduct," or "immoral habit," or offences against morality within the 2nd section of the Clergy Discipline Act, 1892, and are therefore not offences justiciable under the Clergy Discipline Act, 1892. (1) No doubt these expressions "immoral act," "immoral conduct," and "immoral habit" are by the 12th section of the same Act to include such acts, conduct, and habits as are proscribed by the 75th and 109th Canons of 1603. This must mean, however, such *immoral* acts, conduct, or habit as are proscribed by the canons in question, for it is not every offence, act, conduct, or habit proscribed in the 75th Canon which may be justiciable under the Act of 1892; the dictum in one case before the Judicial Committee, *Beneficed Clerk* v. *Lee* (2), cited in *Sweet* v. *Young* (3), giving a too liberal construction to the Act and extending it to "the kind of offences" referred to in Canons 75 and 109, not having been followed in later cases before the Judicial Committee. [He referred to *Moore* v. *Bishop of Oxford.* (4)] There are, indeed, many offences under the 75th Canon which do not come up to the standard of immorality required to satisfy the Act of 1892. For instance, that canon proscribes "the spending time idly by day or night," but can it be supposed that an offence of

(1) The 2nd section of the Clergy Discipline Act, 1892, provides, inter alia, as follows: "If a clergyman" [defined by s. 12 of the same Act to mean, unless the context otherwise requires, a clergyman, not being a bishop of a diocese, who is in holy orders in the Church of England, or who, though ordained by a bishop of another church, is permitted to officiate as a priest or deacon of the Church of England] ". . . . is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any of the parishioners of the parish in which such clergyman holds preferment, or by the bishop of the diocese, or by any person approved by the bishop, and tried in the Consistory Court of the diocese in which he holds preferment . . . ."

(2) [1897] A. C. 226, at p. 229.

(3) [1902] P. 37, at p. 41.

(4) [1904] A. C. 283, at p. 285.

this kind is an offence against morality and cognizable under the Act of 1892? If, therefore, the improprieties of which the respondent is alleged to have been guilty, though analogous to if not exactly the same as the offences referred to in the 75th Canon, are not immoral acts or offences against morality within the 2nd section of the Act of 1892, no question can arise as to the Court being prevented from inquiring into them as grounds for the scandal existing concerning the respondent, whilst even if they are immoral acts or offences against morality within that section, they are also offences against the ordination vows taken by the respondent, and as such last-mentioned offences can be inquired into by this Court without reference to any offences under the 75th Canon.

The respondent prayed that the Court would refuse to admit the articles on the ground that the Court had no jurisdiction to entertain the cause.

THE JUDGE OF THE CHANCERY COURT OF YORK. This is a proceeding under the Church Discipline Act, 1840, promoted by Anthony Nichol Bowman in his private capacity. He is, however, the secretary of the Bishop of Carlisle, in whose diocese the defendant is beneficed.

The promoter exhibits articles against the defendant, charging him with having by his acts caused scandal concerning himself in his relations with one A. B. The question before me to-day is whether these articles ought to be admitted, so that the case may proceed to trial.

The defendant objects to the jurisdiction of the Court on the ground that the judge's style is wrongly stated in the citation, and that this alleged error vitiates the whole proceedings. In the citation the judge is described as Official Principal *and* Auditor of the Chancery Court of the Archbishop of York. The citation was issued in response to Letters of Request from the Bishop of Carlisle to me as judge of the Chancery Court of York. The bishop in sending his Letters of Request, and I in issuing citation to the defendant to appear before me as judge of the Chancery Court of York, have acted under the powers conferred

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The Judge of the Chancery Court of York.

by s. 13 of the Church Discipline Act, 1840. That section authorizes the bishop to send cases arising in his diocese under that Act by Letters of Request to the Court of Appeal of the province, and authorizes that Court to hear and determine cases so sent. The Chancery Court of York is the Court of Appeal of the Province of York, in which province the diocese of Carlisle is comprised. The defendant objects on the ground that the judge is described in the citation as Official Principal *and* Auditor of the Chancery Court of York, whereas his true style is Official Principal *or* Auditor of the Chancery Court of York. My patent of appointment, and that of my immediate predecessor, certainly have the word *or* and not *and*. Moreover, the Act 37 & 38 Vict. c. 85, s. 7, which attaches, for the purposes of that statute, the office of Provincial Judge to the judgeship thereby created, uses the same style. But this variation does not, in my opinion, affect the validity of the citation. The title of the judge of this Court is "Official Principal," and he is so described in the citation. In Mr. Granville Harcourt Vernon's patent, mentioned by the defendant in his written statement of objections, he is also described as "Auditor of the causes and businesses of our Chancery Court of York." Whether Official Principal and Auditor are taken as alternative ways of describing the judge or whether his complete title is taken to be Official Principal and Auditor seems to me immaterial. In ancient times the auditor was not quite the same as the judge. He was the person who heard the evidence and prepared the case for submission to the judge who decided it. In this as in the Southern Province there was a Court of Audience in which the Archbishop seems to have sat personally, and the auditor of the Court assisted him in the way I have mentioned. Possibly the title of auditor with reference to the Chancery Court of York was derived from its use in regard to this other Court which has long ago ceased to exist separately from the Chancery Court of York.(1) But however that may be, the name of the judge, the style of his office, and the Court over which he presides, namely, the Chancery Court of York, are adequately and correctly stated in the citation.

(1) As to the Court of Audience in the Southern Province, see *Boyd* v. *Phillpotts*, (1874) L. R. 4 A. & E. 297, at pp. 319–321.

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The defendant could therefore have had no doubt as to where and before whom he was required to appear. If, as in the case of *Williams* v. *Bott* (1), the defendant had been cited by an individual who was not the then judge of the Court, or if he had been cited before an official (e.g., the Vicar-General) other than the judge of the Provincial Court (*Thorpe* v. *Mansell* (2)), the case would have been different. Under the circumstances I have no doubt that I ought to overrule the defendant's objection, and I do so.

In his written statement of objections the defendant made another point, which, however, he withdrew at the Bar. This point, if I rightly understand it, was that the duty of considering charges such as are made in this case properly belongs to the Vicar-General, in whose name therefore the citation ought, according to this contention, to have issued. This is, however, a mistake ; the duties of the Vicar-General of the province were in 1840 (the date of the Church Discipline Act) and are now administrative and not judicial, except in the one matter of the confirmation of elections of bishops. The judge of the Provincial Court of the province is the judge of the Chancery Court of York.

Another difficulty exists to the admission of these articles, to which, although not raised by the defendant in his written statement, I have invited the attention of the promoter's counsel, and as to which I have heard argument.

The Church Discipline Act, 1840, applied until 1892 to every case of a clergyman either charged with, or by common fame supposed to have committed, any offence against the laws ecclesiastical; and that statute provided machinery for dealing with such cases in the Ecclesiastical Courts. But in 1892 the Clergy Discipline Act of that year was passed, which provided an entirely different machinery for dealing with a certain class of ecclesiastical offences, namely, immoral acts, immoral conduct, and immoral habits, on the part of clergymen. By s. 14, sub-s. 3, of the latter Act the Church Discipline Act, 1840, was repealed "as respects any proceeding instituted against a clergyman for an offence for which he could be prosecuted" under the Act of 1892.

(1) 1 Cons. 1. (2) 1 Cons. 4, n.

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By s. 12 of the Act of 1892 the expressions "immoral act," "immoral conduct," and "immoral habit" are in that Act to include such acts, conduct, and habits as are proscribed by the 75th and 109th Canons of 1603. While the latter denounced adultery, whoredom, incest, drunkenness, swearing, ribaldry, usury, and any other uncleanness and wickedness of life, the former provides that clergymen ought to be "always doing the things which shall appertain to honesty, and endeavouring to profit the Church of God, having always in mind that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures to be inflicted with severity according to the qualities of their offences."

In considering the effect of these canons Lord Halsbury, delivering the judgment of the Judicial Committee in *Beneficed Clerk* v. *Lee* (1), said: "The language of these Canons denounces the offences which the 109th Canon sums up as uncleanness and wickedness of life, but it goes further and condemns acts and conduct hardly to be considered immoral, but certainly dangerous to the reputation, or unworthy of the character of ministers of religion."

As I understand the matter, conduct "proscribed" by the 75th Canon is not confined to the particular examples, such as resorting to taverns and playing at dice, given in the canon, but extends to all conduct which being in breach of its provisions is therein referred to as an offence to be met by the infliction of ecclesiastical censures. The 75th Canon is drawn in general terms, and it is obvious that there must be cases (e.g., of lack of studious habits) where, although a clergyman's conduct might not come up to the high standard set in the affirmative part of the canon, it would not be possible to say that his failure to reach this standard constituted an offence under the canon, and could be visited by the infliction of ecclesiastical censures. In these cases, therefore, the clergyman has not been guilty of conduct proscribed by the 75th Canon.

Now the articles exhibited in this case appear to have been framed with the intention of charging the defendant with having

(1) [1897] A. C. 226, at p. 229.

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brought scandal on the Church by conduct, towards A. B., so unfitting and improper, in his actual position as a clergyman and incumbent of the Church of England, as to cause such scandal. It is alleged that Mr. Lax, although a married man, has been for many months consorting, as her lover, with this young woman. It is alleged that he has been constantly seen alone in her company, often for hours together, frequently at night, sometimes in the open fields, sometimes in church, sometimes at his house, sometimes at her lodging. It is alleged that he has been seen kissing her, walking with his arm round her, and sitting in a public-house with the girl at his side, her head resting on his shoulder. It is further alleged that this conduct of the defendant has caused scandal concerning himself in connection with the girl.

The question is whether this charge can now be lawfully brought under the Act of 1840. That it could have been so brought prior to the Act of 1892 I have no doubt. There are very many cases in the books and records both before and since the Act of 1840 was passed in which the charge of causing offence or scandal to the Church by improper conduct has been successfully made a ground of disciplinary proceedings in the Ecclesiastical Courts. It will suffice to mention one authority, *Re Monckton.* (1) It was a case under the Act of 1840. The Bishop of London issued a commission under that Act to inquire whether there was a prima facie case for proceedings. The chairman of the commission was Dr. Lushington, and the matter was most carefully considered by him, and the occasion used as an opportunity of creating a precedent for subsequent cases under the then recent Church Discipline Act, 1840. The commission reported that there was not sufficient evidence to justify proceedings in respect of specific charges of fornication and intoxication which had been made, but that having regard to the evidence of the defendant's conduct and demeanour towards various females, and especially one named in the report,—a conduct and demeanour which the commission regarded as degrading to a clergyman—there was sufficient ground for proceeding against him on the charge of having by such conduct and demeanour

(1) (1845) 3 N. of C. lv., Suppl. See also *Borough* v. *Collins*, 15 P. D. 81.

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brought great scandal on the Church. In that case the accused submitted to sentence, without further proceedings.

It must be borne in mind that in a case of this sort there can be no conviction in respect of the scandal unless the improper conduct which caused the scandal is proved. No doubt centuries ago the mere existence of ill-repute against a person was deemed enough to enable the Court to put him to purgation; that is, he could be required to assert his innocence on oath, and to produce compurgators who were willing to swear that they believed him (Decret. Greg. ix. lib. v. tit. xxxiv., xxxv. (1)). But this process of the oath ex officio, as it was called, was abolished in England by 13 Car. 2, stat. 1, c. 12, s. 4. In modern times I do not think it admits of doubt that the Ecclesiastical Courts have never held a man responsible for offence or scandal unless it has been proved to have been caused by blameworthy conduct of his own: see, e.g., *Burder* v. ————. (2) In all the cases to which I have referred where scandal is pleaded, it is in conjunction with some specific wrong-doing which has caused it. There were two issues of fact, therefore, to be decided in a suit where scandal was pleaded. First, the promoter had to establish that the defendant had been guilty of the acts or conduct which had created the scandal. Secondly, the promoter had to establish that scandal, resulting from such acts or conduct, in fact existed. If he failed on the first issue I apprehend that he failed altogether. If he succeeded in bringing home to the defendant the acts or conduct alleged against him, but failed to shew that the alleged scandal existed, the result of the proceedings must have depended on the nature of the acts or conduct proved against the defendant. If they were of such a character that they constituted ecclesiastical offences per se the suit would succeed. If they could not be so described, the defendant would escape legal censure, although he might not be free from culpability. If I may venture to speculate, I should say that scandal was sometimes specially pleaded where it seemed open to doubt whether the actual wrong-doing amounted to an ecclesiastical offence, and the

(1) Corpus Juris Canonici, vol. 2, pp. 870, 877, ed. 1881.
(2) (1844) 3 Curt. 822, at p. 838.

scandal caused to the Church by the defendant was relied on by way of aggravation.

It is plain, therefore, that in a suit for scandal the acts or conduct of the defendant formed an essential part of any case against him. I do not think that it is possible for the promoter so to separate the scandal from the wrong-doing which caused the scandal, where the wrong-doing constitutes an ecclesiastical offence per se, as to be able to say that, in proceeding on account of the scandal, he is not proceeding for the offence which caused the scandal. In the present instance it seems to me that the promoter's case is (1.) that the defendant has committed certain blameworthy acts, and (2.) that scandal has resulted for which the defendant is responsible. In my opinion the acts and conduct charged against the defendant constitute, as indeed the promoter in the fourth and ninth paragraphs of the articles pleads, a breach of the 75th Canon of 1603 to which I have already referred. But, if so, the defendant's acts and conduct are immoral within the meaning of the Clergy Discipline Act, 1892, as explained in *Beneficed Clerk* v. *Lee*. (1) This suit is therefore a proceeding against a clergyman for offences for which he could be prosecuted under the Act of 1892, and it is not the less so because it is also a proceeding for another offence (creating scandal) for which he could not be prosecuted under that Act. It follows that, so far as this suit is concerned, the Act of 1840 has been repealed, and I have no jurisdiction to deal with the matter in its present shape. The proceedings should in my judgment have been brought under the Act of 1892. It is scarcely necessary for me to add that nothing I have said ought in any way to prejudice the case as to its merits. The allegations made against the defendant are, of course, mere allegations, which before they could be treated as true would require to be established by evidence.

I desire to add one observation, and it is this. If the view I have expressed be erroneous, it would be easy in nearly every suit against a criminous clerk to bring it under the Act of 1840 notwithstanding the intention of the Legislature to the contrary. In almost all cases of moral offences committed by clergymen, grave scandal is created in the neighbourhood where they

(1) [1897] A. C. 226.

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reside or minister, and it would seem open to every promoter, who wanted to do so, to avail himself of the Act of 1840 by the simple expedient of prosecuting, not merely for the offence, but for the scandal caused by the offence.

The order that I make on this motion is to refuse to admit the articles, and the ground on which I base my refusal, namely, that the proceedings do not lie under the Act of 1840, makes it impossible for the promoter to take any further step in the suit.

Solicitors for promoter: *Mounsey, Bowman & Graham.*

C. F. J.

C. A.

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July 12, 13, 14.

[IN THE COURT OF APPEAL.]

THE GROVEHURST.

Admiralty — Collision — Steam Trawler engaged in Trawling — Steamship crossing — Effect of Exhibition of Triplex Light — Giving way — Regulations for Preventing Collisions at Sea, 1897, *arts.* 9 (1906) (*d*) (1.), 19, 21, 27.

By art. 19 of the regulations for preventing collisions at sea, 1897, "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." By art. 27, "In obeying and construing these rules, due regard shall be had to . . . . any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger":—

Held by the Court of Appeal, that the exhibition by a steam vessel "engaged in trawling" of the special lights, rendered compulsory by art. 9 (1906) (*d*) (1.) of the above regulations, was an indication that "special circumstances" existed within the meaning of art. 27, rendering the trawler incapable of obeying art. 19, and, therefore, casting upon the other crossing steam vessel the duty of keeping out of the way.

The reasoning in *The Tweedsdale*, (1889) 14 P. D. 164, so far as applicable, followed.

The Craigellachie, [1909] P. 1, disapproved.

APPEAL by defendants and counter-claimants, owners of the *Grovehurst* and her freight, from a decision of Bargrave Deane J. pronouncing their vessel alone to blame for a collision with the *Europe*, owned by the plaintiffs, the North Eastern Steam

Fishing Company, Limited, and the master and crew thereof suing for their lost effects.

The case raised the question as to the relative duties of a steam vessel, engaged in trawling, and an unincumbered steam vessel crossing her on her (the trawler's) own starboard side with risk of collision, and involved the consideration of arts. 9 (*d*) (1.), 19, 21, and 27 of the regulations for preventing collisions at sea 1897. (1)

On January 7, 1910, about 3.30 A.M., the weather being fine, and clear, the wind south-easterly light, and the tide high water slack, the *Europe*—a British steam trawler of 151 tons gross register, with about 100 boxes of fish on board, and manned by a crew of nine hands—was trawling in the North Sea about thirty miles to the northward and eastward of Flamborough Head, on a course, at the material time, of about N. b. W., and making about two to two-and-a-half knots through the water. She carried the regulation lights required by art. 9 (1906) (*d*) (1.), including a stern light, and those in charge sighted the mast-head light of the *Grovehurst* about four to five miles off and about five to six points on the starboard bow.

(1) Art. 9 (May 1, 1906):

"(*d*) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—

"1. If steam vessels, shall carry in the same position as the white light mentioned in article 2 (*a*), a tricoloured lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides respectively; and not less than six nor more than twelve feet below the tricoloured lantern a white light in a lantern, so constructed as to show a clear uniform and unbroken light all round the horizon."

Art. 19: "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Art. 21: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

Art. 27: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

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The *Grovehurst* is an iron screw steamship of the port of Landscrona in Sweden, of 1382 tons gross register, with triple expansion engines of 650 horse power indicated, and manned by a crew of eighteen hands. She was on a voyage from Riga to Hull, laden with a cargo of pit props, and, when the lights of the *Europe* were first seen about a point on the starboard bow, she was steering a course of S. W. b. W. $\frac{3}{4}$ W., magnetic, and was making about eight to eight-and-a-half knots with her engines working full speed. She carried the regulation masthead, side, and stern lights.

The case was tried on March 17 and 18, 1910, with the assistance of two of the Elder Brethren of the Trinity House. The facts relating to the collision fully appear from the following judgment:—

March 21. BARGRAVE DEANE J. This is an action of damage with reference to a collision which took place between the steam trawler *Europe* and the steamship *Grovehurst*. The collision occurred about half-past 3 o'clock on the early morning of January 7 this year. The place of the collision was about thirty miles to the northward and eastward of Flamborough Head, on a fishing bank called the Flamborough Bank, which is said to be a piece of ground some sixteen miles long by two to three miles in width, and is frequented by vessels from Grimsby for trawling. On either side of it there is said to be rough ground, so that the place is distinctly defined. The trawler came out from Grimsby to fish, and was fishing there for some days before the day of the collision. The *Grovehurst* was coming from Riga, bound for the Humber, and both vessels were exhibiting their proper lights at the time. The *Grovehurst* had her masthead light, two side lights, and a stern light, and the trawler, which had her trawl down at that time, was exhibiting the triplex light, and under it a globe light shewing a white light all round, and the stern light. She was in company with another trawler from Grimsby, called the *Marlborough*, and the two vessels were working what is called the upper end, or southern end of this bank. The collision took place by the *Grovehurst* striking the starboard side of the trawler a little forward of the funnel, cutting into her so deeply as to

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sink her within a very short time, and, unfortunately, two lives were lost, the mate and the engineer of the *Europe* being drowned.

Each vessel blames the other, and it is material to see how the facts apparently shape themselves. The trawler, an oldish boat, manned by nine hands, and about 100 feet long, fished up and down the bank, that is to say from north to south, and from south to north, working it by an hour and a half's trawling at a time, I think it is said. She was coming up, that is according to their parlance, from the north to the south, and when she got up to the south she hauled her trawl. She had her trawl down, with a warp on her starboard side, and another warp aft, and the evidence is that when a trawler is so situated, with a warp on her starboard side, she cannot turn to port under a starboard helm. When she has the port warp out she cannot turn to starboard, and it is a very intelligible matter to those who appreciate the position. It is an important fact in this case that the *Grovehurst* says that the trawler turned under a starboard helm, whereas the trawler says she was incapable of doing so, owing to the starboard warp being out, and that as a matter of fact she turned from port to starboard, and she is corroborated as to this particular difficulty in turning with her trawl out by the *Marlborough*, a similar ship, which was trawling on the same ground at the same time. The *Europe* says she was trawling up, she hauled her trawl and she let it out again, and, having let it out, she proceeded to turn under her port helm from port to starboard, and having got straight down again she was proceeding on, shewing her starboard side to any vessel approaching from the eastward, and that it was when in that position that she first saw the light of the *Grovehurst* somewhere on her starboard bow. She says that from that time she never altered her course; she kept on the course of N. by W., and about a minute or so before the collision, seeing this vessel approaching, she gave her a long blast to warn her, to call her attention to her, and that immediately before the collision, when the *Grovehurst* was approaching in such a position that there was no chance of avoiding the collision, she (the *Europe*) blew another long blast, and stopped

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her engines, that the effect of stopping her engines with this trawl out was to stop her immediately in the water, and that she was struck as described. According to her, she omitted nothing which she could have done to avoid the collision—there was nothing else which could have been done; the whole fault, she says, was the want of proper look-out on board the *Grovehurst*, that she came straight on and struck her instead of passing under her stern.

The story of the *Grovehurst* is that coming from Riga across the North Sea she saw a little on her starboard bow, first of all, two white lights, then, watching those white lights, she saw them develop into a white and red light, and, still watching them, she says the vessel she was watching must have come round under a starboard helm, and turned the white and red lights into two white lights, and then the two white lights into white and green lights, and that that was done practically under her bows, at a time when it was very difficult, if not impossible, to avoid a collision, and that she at once hard-a-starboarded her helm and put her engines astern, but it was too late to avoid a collision, and the collision happened, and the whole blame is attributed by her to the vessel which she struck for having gone round under her starboard helm under her bows. The story, of course, told by the *Grovehurst*, if it were an absolutely correct one, would relieve her, because a vessel has no right to go about under the bows of another vessel without giving some warning blast, and without denoting what she is doing. It is said that, being a trawler, she was not under the sailing rules, but I am of opinion that if this trawler did go about, as described by the *Grovehurst*, she ought to have denoted that by giving a signal. I am not dealing with the difficult question which I shall have to deal with later, as to whether these vessels have, or have not, to get out of the way of a steam vessel.

On these two opposite accounts there comes again a third story, and the third story is the story of the *Marlborough*. The *Marlborough*, as I have said, was fishing on this ground, and she is first brought into the history when she is to the northward of the *Europe*, and going about, and coming up to trawl to the southward. She had her port gear down. She went about

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under a starboard helm, bringing her head to port, and then proceeded, according to her own evidence, and that of the *Europe*, to fish up the bank to the southward, in which case she would, of course, be shewing white and red to the *Grovehurst* as she approached. According to the *Grovehurst*, there was a vessel away to the northward of the vessel she collided with, and the *Grovehurst* says she was a mile to the northward of the vessel she collided with, and that she was shewing at first two white lights and afterwards, I think she said, a white and red; but she, according to the *Grovehurst*, had nothing whatever to do with this collision—in fact she was a mile away at the time. Now, is that true? It is sworn by those on board the *Europe*, and also by those on board the *Marlborough*, that it is not true. It is said by these two vessels that the *Marlborough* was coming up from the northward at the time when the *Grovehurst's* white light was first sighted, and that by the time when the collision occurred the two trawlers were abeam of each other, the two vessels being port to port, the *Marlborough* having come up on the port bow of the *Europe*, and passing at the time port to port. Those on the *Marlborough* say that they stopped their engines about that time, because they intended, having got near to the southern end of the bank, to go about, and that they waited for the *Europe* to go ahead, and get out of their way, with her trawl, before they could likewise follow suit by going round and trawling to the northward. If that is a true story, of course, I cannot accept the story of the *Grovehurst*. Now, who is it on the *Grovehurst* who gives evidence? There are really only three persons who give evidence. There was a boy of fifteen at the helm, and it is naturally a matter of comment that we should have practically a child at the helm of this steamer, of some 1382 tons gross; but, on the other hand, it is well known that these Scandinavian steamers do have quite young hands, and if the boy was a competent helmsman, it does not seem that there is any reason why he should not be there. We have also seen the look-out, and he is also a boy, I think, of some seventeen years of age. But there it is. It seems rather young for a boy of that age to be in such a responsible position on board this ship. But,

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again, a boy has keen eyesight and perhaps keen intelligence, and probably, being young, he may be much more energetic and alive to what is going on than an older man might be. I do not think that the fact that there were these two lads in responsible positions affects the collision. But one thing did happen which affected the collision, and that is that the boy on the look-out, having reported first two white lights, did report the white and red, and, after that, never reported a white and green. According to the *Grovehurst*, they never saw anything, until the moment of the collision, of the white and green, and certainly the look-out never reported a white and green. There was on the bridge the chief officer, whom I have seen also, the third person who was a witness affecting this case, and the chief officer said that the two white lights were reported, the white and red were reported, but no white and green, and his attention seems to have been directed all the time to the vessel which had the two white lights, and then white and red. Now, was that the *Marlborough*? He says that he ported the helm for the white and red, intending to go under the stern of the vessel shewing the white and red, but suddenly, when the white and red, according to them, turned to white and green, which denoted that, instead of being a vessel going from north to south, she was going from south to north, they hard-a-starboarded, but it was too late. Their story is that, at the moment of collision, the vessel which had been carrying the two white lights and the white and red lights was the *Europe*. My belief is that it was not the *Europe*, but that it was the *Marlborough*, and the reason is this, and it seems to me it is a reason which is unanswerable. The *Marlborough* did go about under a starboard helm; she would then be shewing the globe all-round light, and the stern light to the *Grovehurst*, and, as she got further round, she would shew a white and red. The other vessel, the *Europe*, would have to go round under a port helm, and she would never shew, at any material time, a white light and a red, or two white lights, to the *Grovehurst*. Undoubtedly she was shewing a white and green at the moment of the collision; but if it is true, as I believe it to be true, that at the time in question these two vessels, the *Marlborough* and the

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Europe, were meeting and arriving at a point when possibly the red light of the *Marlborough* might be shut in, and that the other vessel, the *Europe*, had never been observed until she came up to a point where she would be crossing the *Marlborough*, why then that would account for the whole matter, and it may very well be, and I believe it to be, that the *Europe* was never observed from the *Grovehurst* until just before the collision, and that all the attention was fixed on the *Marlborough*, and that they were under the impression that that was the only vessel in the immediate vicinity.

I have said it is a question of fact. I have got to say which side I believe. I do not believe the story told by the *Grovehurst* that at the time of the collision the *Marlborough* was a mile away, and there is a very good reason why I do not. Immediately the *Europe* was struck, the men at once got into her boat, which was aft. She sank, and the boat floated, and the men on that boat got on board the *Marlborough* at once. If the *Marlborough* was a mile away at the time of the collision, with her trawl down, it is impossible that they could have been close at hand, so as to take these men on board at that time. Again they went to the *Marlborough*, and did not go to the *Grovehurst*. They got up to the *Marlborough* before they could get to the *Grovehurst* although she was close at hand after the collision. The result of it, in my opinion, is that the cause of this collision was a defective look-out on the part of the *Grovehurst*, that they did not observe the vessel with which they collided until the last moment, and the story of her going about in the way described being an impossibility still more adds to the strength of my conviction that they never saw the *Europe* until just before the collision, and when it was too late to avoid her.

For these reasons I am of opinion that the *Grovehurst* is alone to blame.

I want to say a word about trawlers getting out of the way of other vessels. In my opinion, the whole object of putting into law the necessity for carrying the triplex light when the trawl is down is to shew vessels approaching, not that the trawler will act under the ordinary sea rules, but that she, at the time, is incapable of following the sea rules, and that the vessel which is

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approaching must get out of the way. There is a case in which it was held that a sailing vessel should do so, and there is a rule which says that sailing vessels shall do so, but there is no rule which says that a steamer must get out of a trawler's way. But if a sailing vessel should do so, a fortiori a steamer should, because she has more power to get out of the way of a trawler which is denoting by her lights that she has her trawl down. I say that by the way. I do not believe it affected this collision except that it might be said, and has been said, that the *Europe* had the other vessel on her starboard side, and therefore it was her duty to get out of the way. But I do not think that rule was meant to apply to this case, where, as has been proved, she had her trawl down at the time of the collision.

July 12, 13. *Laing, K.C.*, and *Dawson Miller*, for the appellants (defendants), owners of the *Grovehurst*. Admitting that the *Grovehurst* is to blame for defective look-out, it is submitted that, on the facts as found by the learned judge in the Court below, the *Europe* is also to blame for not getting out of the way of the *Grovehurst*. The *Europe* had the red light of the *Grovehurst* "on her own starboard side," and it was, therefore, her duty to obey art. 19 of the regulations for preventing collisions at sea.

The finding of the Court below is, in effect, that, when a trawler hoists the triplex light, other vessels must keep out of the way, but this is a misapplication and extension of art. 26, which only deals with sailing vessels keeping out of the way of sailing trawlers, and there is nothing in the rules to relieve a steam trawler from the obligation of getting out of the way of a steam vessel, so that the onus is on the trawler to shew that she could not get out of the way, and that onus was, in this case, not discharged.

In *The Warrior* (1) a steam tug, which had a fully laden ship in tow, and was steaming against a head wind in the open sea, was held alone to blame for not getting out of the way of a schooner, the red light of which she saw on the starboard beam about a mile off. The defence of special circumstances, namely,

(1) (1872) L. R. 3 A. & E. 553.

being incumbered by her tow, was held by Sir Robert Phillimore, acting on the advice of the Elder Brethren, not to justify a departure from the rules, although the extra lights carried by a tug are for the purpose of indicating that she is not entirely her own mistress, and cannot be expected to act in every respect as an ordinary steam vessel: *The American and The Syria.* (1)

In *The Tweedsdale* (2) a steam trawler was held not to blame for a collision with a sailing ship; but when that decision was given the carrying of the triplex light was optional, and, as she was deemed to have rightly exercised that option, she thereby signified that she was a trawler at work, at such a slow speed as not to be under command, and that, in those special circumstances, other vessels must get out of her way. That option has now been taken away, and the carrying of the triplex light made obligatory, so that, even if the reasoning in that case can be treated as sound, it no longer applies, and no provision has been made that the triplex light is to indicate that the steam trawler cannot keep out of the way.

At the time *The Dunelm* (3) was decided, the regulations dealt with by Sir Charles Butt in *The Tweedsdale* (2) were not in force, but it is material to note that there a steam trawler engaged in trawling, and going through the water at the same rate as the *Europe* in the present case, namely, two-and-a-half knots, was held to blame for not carrying side lights, her speed being greater than was necessary to keep herself under command whilst fishing.

In *The Upton Castle* (4) Bargrave Deane J. followed the reasoning of Sir Charles Butt in *The Tweedsdale* (2), and held that a steam trawler is, after getting in her trawl, so as to be no longer incumbered, to be treated as a steam vessel under command, and, therefore, bound to keep out of the way of a sailing vessel, though in *The Cockatrice* (5) the same learned judge distinguished *The Upton Castle* (4) and held that a steam trawler was justified in keeping her triplex light up during the intervals of shooting her trawl. In *The Craigellachie* (6) a

(1) (1874) L. R. 6 P. C. 127, 131.
(2) 14 P. D. 164.
(3) (1884) 9 P. D. 164.
(4) [1906] P. 147.
(5) [1908] P. 182.
(6) [1909] P. 1.

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steam trawler was fishing with her trawl down over her starboard quarter, and making two-and-a-half to three knots, when she came into collision with a sailing vessel, and was held by Bucknill J. to blame, as she might, by a small alteration of her course, have kept out of the way. That decision is decisive of the present case.

In *The Gladys* (1) a steam trawler engaged in fishing was held not to blame for not keeping out of the way; but there the evidence shewed that she could not move her engines—that is to say, if a steam trawler can keep out of the way, she must do so, otherwise she infringes the regulations within the meaning of s. 419, sub-s. 4, of the Merchant Shipping Act, 1894.

In *The Pitgaveney* (2) a collision occurred between a sailing drifter and a steam drifter, and the sailing vessel was held alone to blame, as the steam vessel could not, in the circumstances, get out of the way. In the present case, the *Europe* could have ported, or she could have stopped earlier than she did, either of which manœuvres would have avoided the collision.

[On the question of the necessity of adhering to the terms of the regulations, and not acting on any supposed practice of seamen inconsistent with those regulations, the cases of *The Sylph* (3), *The Unity* (4), *The Hand of Providence* (5), and *The Earl of Wemyss* (6) were mentioned.]

Batten, K.C., and *A. D. Bateson*, for the respondents (plaintiffs), owners of the *Europe*. In *The Tweedsdale* (7) it was held that the steam trawler was not to blame for a collision with a sailing ship, as she had her trawl down, and was only going at the rate of one-and-a-half knots, and was therefore justified in carrying the triplex light which indicated that there were special circumstances preventing her from getting out of the way. The soundness of the reasoning in that case has never been doubted, and the triplex light, at that time optional, has been made compulsory, so that if a vessel is engaged in trawling, that is, in the words of art. 9, engaged in "dragging an apparatus along the

(1) Ante, p. 13.
(2) Ante, p. 215.
(3) (1854) 2 Spinks, 75.
(4) (1856) Swa. 101.
(5) (1856) Swa. 107.
(6) (1889) 6 Asp. M. L. C. 407.
(7) 14 P. D. 164.

bottom of the sea," and, if a steam vessel, is carrying the tri-coloured lantern, and the white light mentioned in the article, then other vessels are apprised that "special circumstances" exist within the meaning of art. 27, rendering art. 19 inoperative in the sense that the steam trawler is not bound to get out of the way.

The reasoning in *The Tweedsdale* (1) was the basis of the decision in *The Upton Castle* (2), where a steam trawler was held to blame for not getting out of the way of a sailing vessel, for she was not justified in shewing the alternative light as her trawl was not down at the material time, so that she was not incumbered, and was free to manœuvre.

If this is not the meaning to be attached to the exhibition of the triplex light, much uncertainty will exist in the minds of those in charge of vessels meeting with trawlers as to which is to give way, and it was to obviate this difficulty that the light was made obligatory.

July 14. VAUGHAN WILLIAMS L.J. In my opinion this appeal must be dismissed. It is a case in which Bargrave Deane J. has held that the steamship *Grovehurst* is alone responsible for the collision which took place with the steam trawler *Europe*. The appeal by the defendants, the owners of the *Grovehurst*, is upon the ground that the learned judge ought to have held that both vessels were to blame. It is not denied by the appellants that the *Grovehurst* is to blame; but it is said that the trawler is also to blame.

The material facts are: that the trawler at the time immediately before the collision had her trawl down, with a warp on her starboard side, and another warp aft. When a trawler is so situated, with a warp on her starboard side, she cannot turn to port under a starboard helm, and when she has the port warp out she cannot turn to starboard. I have asked our assessors and they say that that proposition as to the incapacity of a trawler to turn under those circumstances is quite true. There is some contradictory evidence on the point, it being alleged by those in charge of the *Grovehurst* that the trawler did in fact

(1) 14 P. D. 164. (2) [1906] P. 147.

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turn under a starboard helm. I think on the evidence, and Bargrave Deane J. thought on the evidence, that the trawler did not turn under those circumstances, and could not so turn, and that she never altered her course, but kept on her course, N. by W.; and that about a minute before the collision, when, seeing the other vessel approaching, she gave her a long blast to attract her attention; and immediately before the collision, when there was no chance of avoiding the collision, blew another long blast and stopped her engines. The trawler says she omitted nothing which could have been done to avoid the collision, and that the whole fault was the want of proper look-out on board the *Grovehurst*, which came straight on and struck her instead of passing under her stern as she should have done. I agree with the view taken by the trawler. There is no doubt, however, that the trawler did not get out of the way of the steamer in the way it would have been her duty to do if the rules for ordinary vessels had been followed by the trawler.

The whole question in this case is whether trawlers have or have not to get out of the way of a steam vessel—I mean trawlers with their trawls down. Bargrave Deane J., so far as the facts are concerned, believed the story of the trawler and not the story of the *Grovehurst*, and held that the cause of the collision was defective look-out on the part of the *Grovehurst*. On the question of the obligation of trawlers to get out of the way of other vessels the learned judge says: "I want to say a word about trawlers getting out of the way of other vessels. In my opinion, the whole object of putting into law the necessity for carrying the triplex light, when the trawl is down, is to shew vessels approaching, not that the trawler will act under the ordinary sea rules, but that she, at the time, is incapable of following the sea rules, and that the vessel which is approaching must get out of the way. There is a case in which it was held that a sailing vessel should do so, and there is a rule which says that sailing vessels shall do so, but there is no rule which says that a steamer must get out of a trawler's way. But if a sailing vessel should do so, a fortiori a steamer should, because she has more power to get out of the way of a trawler which is denoting by her lights that she has her trawl down. I say that by the way.

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I do not believe it affected this collision, except that it might be said, and has been said, that the *Europe* had the other vessel on her starboard side, and therefore it was her duty to get out of the way. But I do not think that that rule was meant to apply to this case, where, as has been proved, she had her trawl down at the time of the collision." I entirely agree with this conclusion in law of the learned judge. I not only agree with it, but I think it is admirably expressed. I can see no reason for the rule that trawlers should carry the triplex light, when the trawl is down, but to shew vessels approaching that trawlers, with their trawls down, must be treated as incapable of obeying the ordinary sea rules, and that therefore other vessels approaching must get out of the trawler's way. The rule referred to, as to the duty—when two steam vessels are crossing so as to involve risk of collision—of the vessel having the other on the starboard side, is art. 19. I think that this is one of the rules which the triplex light informs the approaching steamer that the trawler must be taken as incapable of obeying. It is said that this conclusion is negatived by the express provision of art. 26, affirming the duty of sailing vessels to keep out of the way of sailing vessels or boats fishing with nets or lines or trawls; and it is said that we ought to hold that there is no such duty in the case of steamers, because there is no article corresponding to art. 26 in the case of steamers. I do not agree with that contention. To hold this would be to hold that there is no purpose in steam trawlers exhibiting the triplex light, which they had to do long before art. 26 came into force. This duty of trawlers to exhibit this triplex light is now an absolute duty. Formerly it was an optional duty, to be applied in the discretion of the master of the trawler and according, apparently, to the pace or speed at which the trawler was going. This was found inconvenient, and the articles were altered by making the exhibition of the triplex light a positive duty upon trawlers with their trawls down. In the case of *The Tweedsdale* (1)—decided at a time when the exhibition of the triplex light was discretionary—it was held that a steam trawler, going slowly with a triplex light exhibited, had no duty to get out of

(1) 14 P. D. 164.

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the way of a sailing ship, the incapacity of the trawler to manœuvre, and her triplex light, throwing the duty on other vessels to keep out of the way of the trawler. This decision seems to me to be common sense, and in my opinion applies a fortiori now that the duty of exhibiting the triplex light is absolute. The case of *The Tweedsdale* (1) is based upon the rule that was then in force, art. 23, but for that article there has now been substituted art. 27: "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." Really the article which requires the exhibition of the triplex light affirms by the very passing of it that, where a triplex light is ordered by the articles to be exhibited by trawlers, those trawlers are at once an obstacle to navigation, and an obstacle which constitutes danger; and when once you have got it that the articles necessarily affirm that proposition, the consequence is that you are immediately brought within art. 27, and you have a special circumstance which justifies a departure from the rules—a departure from the rules which is really indicated by the provision itself that the trawlers are to carry the triplex light.

I do not know that it is necessary for me to say anything more on the matter, excepting to refer to two cases. One is the case of *The Upton Castle*. (2) The head-note there is as follows: "A British steam trawler of upwards of twenty tons gross register, fishing in the sea off the coast of Europe lying north of Cape Finisterre, and carrying the alternative lights prescribed by art. 9 of the regulations for preventing collisions at sea, as amended by Orders in Council, is, after getting in her trawl, so as to be no longer incumbered, but able to manœuvre, to be treated as a steam vessel under command, and, therefore, she is bound at night to exhibit the lights for a steam vessel prescribed by art. 2, and must, under art. 20, keep out of the way of a sailing vessel. *The Tweedsdale* (1) followed." I do not wish to read passages from the judgment at length, but on p. 152, it seems to me, Bargrave Deane J. gave a most practical and useful account

(1) 14 P. D. 164. (2) [1906] P. 147.

of how this practice—authorized by the provision of the articles as to the triplex light to be carried by a trawler with the trawl down—is to be applied. The judgment seems to me to do that in a most practical and sensible manner; that is to say, in other words, it recognizes the duty of the trawler, when the trawl is hauled up and the fish thrown into the boat, to obey the rules just as if she was an ordinary vessel under way. The only other case I wish to allude to is the judgment of Bucknill J. in *The Craigellachie*. (1) I think that that decision is inconsistent with the principle of *The Tweedsdale* (2), and also inconsistent with the decision in *The Upton Castle*. (3) I think the decision in *The Upton Castle* (3) is right, and that the decision in *The Tweedsdale* (2) is right, and that the decision of Bucknill J. in *The Craigellachie* (1) is wrong. In those circumstances, I think this appeal must be dismissed with costs.

BUCKLEY L.J. The *Grovehurst* has been found alone to blame. The question is whether the *Europe* is also to blame. The *Europe* is a steam trawler. As the vessels approached each other, the *Europe* had the *Grovehurst* on her starboard bow. The *Europe* had her trawl down, with starboard gear out. Under those circumstances a vessel cannot answer her starboard helm, for the warp prevents, or substantially prevents, her from turning to port. The question is whether the *Europe* owed the duty of obeying the starboard hand rule, that is to say, whether, in these circumstances, art. 19 applied.

The question is a very important question upon the construction of the regulations for preventing collisions at sea, for it is essential to have a clear rule as to who is to get out of the way. It is in the first instance, I think, necessary to bear in mind that if two vessels are approaching each other, one under command and the other not under command, good seamanship requires that the vessel under command shall keep out of the way of the vessel not under command. This fact is recognized in the regulations for preventing collisions. For instance, art. 4 names certain vessels not under command—first, one which "from any

(1) [1909] P. 1. (2) 14 P. D. 164.
(3) [1906] P. 147.

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accident is not under command," and, secondly, "a vessel employed in laying or in picking up a telegraph cable"—and says that such a vessel shall carry certain defined lights. Then it says that those lights "are to be taken by other vessels as signals that the vessel showing them is not under command and cannot, therefore, get out of the way." The regulations do not affirmatively state that such a vessel is not bound to get out of the way. They assume, as matter of demonstration, that if she is not under command, any other vessel will recognize that it is not the duty of the former, but that it is the duty of the latter to get out of the way. Good seamanship, apart from the regulations, requires in those circumstances that the vessel which is under command shall keep out of the way of the vessel which is not under command. In construing art. 9 it is essential to bear that in mind.

In 1889 Sir Charles Butt, (rightly or wrongly), in *The Tweedsdale* (1), held that under the rules as they then stood, as between a steam trawler with her trawl down, and moving at a slow rate of speed, and a sailing ship, the duty of getting out of the way was with the sailing ship. If that was true as between a steam trawler and a sailing ship, it was a fortiori true as between a steam trawler and a steamship. In those circumstances, by Order in Council made in November, 1896, and which came into operation in July, 1897, there was introduced the present art. 26, which provides that, as between a sailing vessel and a sailing trawler, the sailing vessel shall keep out of the way of the sailing trawler. If this was right as between a sailing vessel and a sailing trawler, it was a fortiori right as between a steam vessel and a sailing trawler; and if Sir Charles Butt was right in holding that as between a sailing vessel and a steam trawler the duty to get out of the way was on the sailing vessel, it was a fortiori true that as between a steam trawler and a steam vessel it was the duty of the steam vessel to get out of the way. If, therefore, the decision in *The Tweedsdale* (1) was right, art. 26 added to it would complete the code of rules applicable to the circumstances.

In that state of things, in 1906, the rules as to the lights to be carried by trawlers were altered so as to make it no longer

(1) 14 P. D. 164.

optional but obligatory upon trawlers when engaged in trawling to have certain defined lights—and the lights of a steam trawler and of a sailing trawler are widely different. This is to be found in the new art. 9 (*d*), heads 1 and 2. A statutory obligation imposed upon trawlers, engaged in trawling, to have special lights must have been, as it seems to me, imposed for some purpose, and the purpose must have been to acquaint other vessels that the vessel is a trawler engaged in trawling, and therefore incumbered by her gear. Presumably the object of giving that information was that other vessels might know that in some way she stood in an exceptional position. If that exceptional position was that she was relieved from some duty, which otherwise she would owe, the provision becomes intelligible; but, if not, I do not know what could have been the purpose. As regards steam vessels, engaged in towing, art. 3 imposes upon vessels of that description an obligation to carry certain other defined lights, and they are prescribed in this way—the tug has to indicate by her lights that she is a steam vessel towing, and has to indicate the length of her tow. It has been held that a tug remains bound by the "starboard hand" rule, and counsel for the appellants say that a steam trawler, in the same way, is bound by the starboard hand rule. The cases are not, I think, analogous. The tug, although towing, is under command. The object of her lights is to indicate that she is a tug and to give information as to what is the amount of obstruction to be expected from the length of the line of tows behind her. A steam trawler has no such information to give as to obstructions behind her. Her trawl is behind her, but it sinks very rapidly in the sea. The only fact she has to indicate is that she is a trawler incumbered by her gear, and in those circumstances I have to ask myself what is intended in these rules, by imposing upon her the obligation to carry the triplex light. If the obligation is to say, "Mark you, I am a vessel not under command; I cannot turn this way or that, as I choose; I give you notice that I am not under command;" it will result that under the principles of good seamanship the other vessel must get out of her way because she cannot get out of the way. The result of that is, not that art. 19 does not apply to trawlers—a proposition which I think

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would not be true, because, for instance, the case might arise of two steam trawlers approaching each other, or two sailing trawlers approaching each other, and it may be that art. 19 would then apply. Art. 19 may apply to vessels of this class, but nevertheless, upon the paramount principle of good seamanship, they may, under certain circumstances, be relieved of the obligation to obey that rule. If *The Tweedsdale* (1) is looked at and critically examined, I think that is what Sir Charles Butt there affirmed. I was puzzled by the sentence in his judgment, "In that state of things I think that art. 23 prevents the application of art. 17, and at once relieves the fisherman from the duty of keeping out of the way, and puts upon the other vessel the duty of keeping clear." I do not think I agree that it prevents it unless you read with emphasis "in that state of things," the words with which he commences. If you read art. 23 (now art. 27) you find the words "In obeying and construing these rules due regard shall be had to all dangers of navigation," &c. If that be read to mean "In obeying and construing these rules due regard shall be had to the fact that good seamanship requires that a vessel under command shall keep out of the way of a vessel which is not under command, and to the fact that there will be danger if she does not do so," then the whole difficulty is solved. I think that is what Sir Charles Butt intended to say; in other words, paramount authority is to be given to the paramount obligation to obey the rules of good seamanship; in the case of a vessel not under command, good seamanship requires that the vessel which is under command shall give way to the vessel not under command. Following that principle, I think *The Tweedsdale* (2) was right. In this way, full meaning can be given to the statutory obligation imposed upon a vessel to give information that she is not in a position to obey the "starboard hand" rule. The *Europe* was not under command. She had a triplex light up to indicate that she was not in a position to obey art. 19. Under the circumstances, I think she was not to blame.

THE PRESIDENT (SIR SAMUEL EVANS). Upon this appeal it is admitted that the *Grovehurst* was to blame for the collision; but

(1) 14 P. D. 164, at p. 169. (2) 14 P. D. 164.

it is contended that statutory blame also attaches to the *Europe* under art. 19 of the collision regulations, 1897, and s. 419 of the Merchant Shipping Act, 1894.

The appellants contend that under art. 19 the *Europe* was under a statutory obligation to keep out of the way of the *Grovehurst*, and, consequently, that the *Grovehurst* was bound under art. 21 to keep her course and speed. The *Europe* was a steam trawler, dragging her trawl along the bottom of the sea, and was accordingly "engaged in trawling." The *Grovehurst* was a powerful screw steamer, free to manœuvre as the officer in charge might direct. She answered the description of an unincumbered steamer which was given by Lord Kingsdown in the case of *The Independence* (1) in the following passage:—"A steamer unincumbered is nearly independent of the wind. She can turn out of her course and turn into it again, with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is, therefore, with reason considered bound to give way to a sailing vessel close hauled, which is less subject to control, and less manageable."

The argument of counsel for the appellants involved, I think, the proposition that *The Tweedsdale* (2) was wrongly decided; and they accordingly submitted that *The Tweedsdale* (2) was not good law and ought to be overruled. That case was decided in 1889, five years after Lord Esher (then Brett M.R.), in *The Dunelm* (3), made the following observations:—"My view of an Act of Parliament—and this article is equivalent to an Act of Parliament—which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing." *The Dunelm* (4) was referred to in *The Tweedsdale*. (2) In my view the decision in *The Tweedsdale* (2) proceeded upon the lines of that canon of construction of the collision rules, and was

(1) (1861) 14 Moo. P. C. 103.
(2) 14 P. D. 164.
(3) 9 P. D. 164, at p. 171.
(4) 9 P. D. 164.

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in accordance with good sense and was good law. The substance of the decision was that, having due regard to all dangers of navigation (art. 23, now art. 27), a steam trawler engaged in trawling, in the circumstances of that case, was not bound by art. 17 (now art. 20) to keep out of the way of a crossing sailing vessel. A fortiori the steam trawler would not be bound to keep out of the way of a crossing steamer. If the facts relating to the steam trawler in *The Tweedsdale* (1) had been identical with those in the present proceedings as to speed, difficulty of manœuvring, and so forth, I think the decision would have been the same, and that it would have been right. Again, a fortiori, the decision would have gone the same way if the crossing vessel in the same state of facts had been a steamer and not a sailing vessel. *The Tweedsdale* (1) was decided twenty-one years ago. At that time an option was given to trawlers to carry either of two sets of lights. The decision, as I read it, was that, if the trawler could be reasonably regarded as a vessel incumbered by her trawl so as to be unable to manœuvre with reasonable freedom, she had a right to use one set of lights, and she would then be free from the obligation to keep out of the way under art. 17 (now art. 20). If not, then she had to carry the "under way" lights of a vessel free to manœuvre reasonably freely, and the obligation referred to would attach to her. The responsibility of choosing the lights rested on those who navigated the trawler. This could not be regarded as very satisfactory, either to those responsible for trawlers engaged in fishing or to those in charge of other vessels navigating in or through the same waters. It involved great uncertainty, and in navigation uncertainty involves risk of accident. The difficulties in the way of trawlers, and of steam trawlers, manœuvring are described by Lord Esher in *The Dunelm*. (2) I need not quote the passage. As to speed in trawl fishing, as it was known at the time, he said this (3): "Trawl fishing is a thing which must be very slow, because the net is on the ground, and if trawlers go at all too fast they tear their nets to pieces." As I have said, the

(1) 14 P. D. 164. (2) 9 P. D. 164.
(3) 9 P. D. at p. 173.

decision in *The Tweedsdale* (1) related to a steam trawler. Seven or eight years elapsed, and no case appears to have arisen in which a decision to the same effect could have been given—as it undoubtedly would have been given—in reference to a sailing trawler. After this lapse of time, revised collision regulations were made, and in the rules made on November 27, 1896, to come into force on July 1, 1897, art. 26 appears for the first time, expressly prescribing that sailing vessels under way shall keep out of the way of (inter alia) sailing trawlers.

It is contended for the appellants that this raises the necessary inference, upon a sort of "expressio unius" principle, that steam trawlers were to be treated as steam vessels within art. 19, and were thereby bound to keep out of the way of any other crossing steamer; so that whatever the difficulties might be in the way of the incumbered vessel manœuvring freely or readily (as in the present case) she must keep out of the way; and whatever the speed of the other steamer might be (e.g., twenty knots of an ocean liner) she must keep her speed as well as her course.

I cannot come to the conclusion that such an inference is either obligatory or reasonable.

Nine years more pass by, during which no doubt is cast upon the authority of *The Tweedsdale*. (1) Indeed, on the other hand, it had in July, 1905, been followed in *The Upton Castle*. (2) Then in April, 1906, new rules were promulgated, which came into force on May 1, 1906, by which the option as to the lights to be carried by steam trawlers, which existed in 1889 and which remained in existence up to May 1, 1906, was taken away. Thereafter it was made compulsory on steam trawlers engaged in trawling to carry the lights prescribed by the new art. 9 (*d*).

In 1889 Sir Charles Butt had said in effect, "Where those in charge of a steam trawler reasonably decide to carry the 'exceptional lights' of an incumbered trawler, and not the ordinary lights of a steamer under way, they are not bound to keep out of the way of a crossing vessel," and the new article appears in 1906 prescribing that in all cases of trawlers

(1) 14 P. D. 164. (2) [1906] P. 147.

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engaged in trawling they should carry their special lights, which take the place of the old optional "exceptional lights."

I think it must be taken that the new article was made with knowledge of, and with reference to, the law as laid down in *The Tweedsdale.* (1) There had been for seventeen years an exemption in favour of steam trawlers engaged in trawling from the obligation to keep out of the way where the exceptional lights were reasonably carried, and I think that, when special lights were prescribed and made compulsory, it must be taken that they are reasonably carried, and that the trawlers under the new rules enjoy the like exemption. No case has been cited or found which casts a doubt upon *The Tweedsdale.* (1) If the case of *The Craigellachie* (2) is upon the facts inconsistent with *The Tweedsdale* (1), as it appears to be, in my opinion it cannot stand.

It would seem to be entirely in the interest not only of the fishing community, but also of all those who navigate waters where the fishing business is carried on, that there should be no uncertainty as to the course to be pursued, arising from a want of knowledge of the manœuvring facilities of a trawler, and that, where fishing lights are carried by a trawler, crossing steamers not incumbered should know that the incumbered vessel is there and is incumbered, and that they should direct their operations accordingly. But if by reason of any increased speed of trawlers, or any other circumstances, it is thought that, in the interests of safe navigation, the exemption referred to should not exist any longer, the change must be brought about by new rules on the authority of the Admiralty, the Board of Trade, and the Privy Council. We must deal with the case as the law now stands, and I agree with the other members of the Court that this appeal fails and must be dismissed with costs.

Solicitors for appellants (defendants), owners of the *Grovehurst: Stokes & Stokes, for Bramwell, Bell & Clayton, Newcastle-on-Tyne.*

Solicitors for respondents (plaintiffs), owners of the *Europe: Deacon & Co., for Grange & Wintringham, Great Grimsby.*

(1) 14 P. D. 164. (2) [1909] P. 1.

T. L. M.

[DIVISIONAL COURT.]

1910
July 19.

THE DAWLISH.

Admiralty—Ship — Berth Note — Arbitration Clause — "Dispute arising at loading ports"—Stay of Proceedings.

By a berth note it was agreed between the plaintiffs, shipowners of Cardiff, and the defendants, grain merchants of London and Marioupol, that the plaintiffs' steamship should proceed to the Sea of Azov, and there load from the defendants' nominees a cargo of grain, and discharge the same in the United Kingdom or on the Continent, the defendants to do the stevedoring at rates as per margin, and "in case of any dispute arising at loading ports under this berth note, it is to be submitted to the Rostof-on-Don Bourse Court of Arbitration whose decision is to be final."

The vessel loaded a cargo of wheat, barley, and rye at Marioupol, and, for stevedoring, the defendants charged 40 roubles per thousand chetverts in accordance with the tariff in the margin of the berth note, and deducted the amount from advance freight. On the accounts being received by their London agents the plaintiffs contended that the defendants had overcharged them by not reckoning, in the customary way, the number of poods for barley and rye to the chetvert, and they commenced a county court action against the defendants to recover the difference :—

Held by a Divisional Court (Sir Samuel Evans, President, and Bargrave Deane J.), affirming the decision of the county court judge, that all proceedings in the action must be stayed with a view to arbitration under the clause in the berth note, as the matter in dispute was "What are the proper charges for stevedoring at Marioupol?" and this dispute arose where the stevedoring was done, and where the charges in dispute were made.

Appeal by plaintiffs, the Dawlish Steamship Company, Limited, of Cardiff, shipowners, from an order of the judge of the Cardiff County Court dismissing with costs their action against the defendants, Louis Dreyfus & Co., of London and Marioupol, grain merchants, on the ground that the matter in dispute was within a submission to arbitration.

On April 21, 1910, the plaintiffs, as owners of the steamship *Dawlish*, commenced an action in the Cardiff County Court (admiralty jurisdiction) against the defendants, as freighters, claiming 36*l.* 5*s.* 1*d.* damages "for the breach by the defendants of duty arising out of an agreement made in relation

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to the use or hire of the plaintiffs' steamship *Dawlish*." On April 29, the defendants gave the plaintiffs notice of an application to the county court judge, under s. 4 of the Arbitration Act, 1889, to stay proceedings, and it appeared from the affidavits filed in support of, and in opposition to, the application that:—

On August 5, 1909, a contract was entered into, in London, between the agents of the plaintiffs and the defendants, by way of berth note, under which it was agreed that the plaintiffs' steamship *Dawlish* should proceed to one or two safe ports in the Sea of Azov, and there load from the defendants' nominees a cargo of wheat and/or other grain and/or seed, and discharge same in a safe port in the United Kingdom or on the Continent. The berth note provided, by clause 3, that the defendants were to do stevedoring at rates as per margin, and also provided (clause 10) that "in case of any dispute arising at loading ports under this berth note, it is to be submitted to the Rostof-on-Don Bourse Court of Arbitration whose decision is to be final."

The *Dawlish* loaded a cargo of wheat, barley, and rye at Marioupol, under the berth note, and the defendants, through N. Methinity, a stevedore of Marioupol, did the stevedoring, charging 40 roubles per thousand chetverts in accordance with the tariff in the margin of the berth note, and the master of the *Dawlish*, before leaving Marioupol, signed the stevedore's account for 177*l.* 13*s.*, and the same was paid by deduction from the sum of 385*l.*, advance freight.

The vessel left Marioupol on September 17, 1909, and on November 26 the London agents of the plaintiffs wrote to the defendants in London alleging an overcharge in respect of the stevedoring of the *Dawlish*, by reason of the defendants having reckoned eight poods for barley, and nine poods for rye, to the chetvert, the plaintiffs contending that it was customary at Azov ports, in converting poods into chetverts, to reckon ten poods to the chetvert for all grain. The defendants in reply alleged that a chetvert is a measurement as well as a weight, and that the method adopted of reckoning chetverts of barley and of rye was correct.

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On May 5, 1910, the judge of the Cardiff County Court decided that "the dispute was one which, upon the construction of the contract between the parties, it was intended should be referred to arbitration," and he accordingly ordered that all proceedings in the action be stayed pursuant to s. 4 of the Arbitration Act, 1889.

July 19. *Laing, K.C.*, and *W. N. Raeburn*, for the appellants (plaintiffs), owners of the *Dawlish*. In respect of the cargo of grain, the defendants occupied the positions of freighters, ship's agents at the loading port of Marioupol, and stevedores. As agents, the defendants committed a breach of duty in disbursing more of the plaintiffs' moneys than the plaintiffs were liable for, and also, as stevedores, in making improper and excessive charges for stevedoring. The master signed the stevedore's account in ignorance of the proper charges as he relied on the defendants in their capacity of ship's agents. The accounts were, in the usual course, transmitted to London, and on their examination, long after the vessel had left the loading port, the contention was raised by the plaintiffs in London in respect of the overcharge, which arose out of the employment of the defendants as ship's agents and stevedores.

No dispute arose at the port of loading within the terms of the submission to arbitration contained in clause 10 of the berth note, as only such disputes would be included as arose between the plaintiffs, as shipowners, and the defendants in the position of freighters, and the plaintiffs cannot be debarred of their right to apply to the Courts of this country unless they have clearly bargained those rights away.

On the question of convenience, the contract was made in London, the parties are in this country, and no evidence from the Azov ports will be required, as shipowners and merchants in this country who have traded with Marioupol know what the proper charges should be.

Leslie Scott, K.C., and *A. D. Bateson*, for the respondents (defendants). The proceedings were properly stayed, and the plaintiffs' claim referred to arbitration in accordance with clause 10 of the berth note, for the dispute arose out of the rate

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of stevedoring charged by the defendants, who were, by clause 3 of the berth note, to do the stevedoring. The defendants were not charterers, the contract was to procure a cargo, and the liability of the defendants as freighters ceased when the cargo was loaded, but the dispute arose out of the berth note, as it involved the customary method of reckoning chetverts of grain at Azov ports. That is the matter or question in dispute, arising at a loading port. According to the dictionary meaning "arise" means to spring, originate, or result from, and the dispute originated at the loading port in respect of the stevedoring, that is to say, as to how many poods go to the chetvert.

On the question of discretion, this Court will not interfere with the decision of the learned county court judge, for it is submitted that this question can be more conveniently dealt with by a court of arbitration in the Azov than in this country, and, if the present proceedings were to be continued, it would be necessary to obtain evidence of the custom from Marioupol.

[Reference was made to the case of *Temperley Steam Shipping Co.* v. *Smyth.* (1)]

THE PRESIDENT (SIR SAMUEL EVANS). This is a very short point. The question is, what is the meaning of clause 10 in this berth note or berth contract? On one side it is said that the word "dispute" means "contention," and that therefore it arises where the contention is made. On the other hand it is said that "dispute" means the matter or question in dispute. If the latter be the right meaning, then the matter in dispute arose at the port of loading. Now I put to myself two questions, and the answers, in my view, determine the construction to be placed on clause 10. The first is, what is in dispute? It is this—and therefore the dispute is this—"what are the proper charges for stevedoring at Marioupol?" If that be the dispute, where does it arise? It arises, in my opinion, where the stevedoring work is done and where the charges which are in dispute are made. If that be so, clause 10 applies in this case, and there must be arbitration. Putting it in one word, in my view "dispute" in clause 10 means, not disputation, but matter in dispute. We

(1) [1905] 2 K. B. 791.

see no reason to interfere with the exercise of his discretion by the learned judge, and the appeal therefore fails. 1910 THE DAWLISH.

BARGRAVE DEANE J. I agree.

Appeal dismissed with costs.

Solicitors for appellants (plaintiffs): *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for respondents (defendants): *W. A. Crump & Son.*

T. L. M.

[IN THE COURT OF APPEAL.] C. A. 1910 *July* 11.

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Admiralty—Salvage—Award—Grounds for an Appeal Court reducing the Amount.

The defendants' steamship, from Adelaide to London with a cargo of wool, broke down in the Red Sea, owing to damage to her propeller. She was picked up by the plaintiffs' steamship, from Java to Amsterdam with a general cargo, and was towed in six days about 830 miles to a safe anchorage in Suez Roads. The weather was fine, except towards the end of the towage, when the usual northerly wind and some sea were encountered, and during part of the towage varying currents were met with. The salving vessel lost three days and incurred some expense. The values were large, that of the salving vessel, cargo and freight, 88,000*l.*, and that of the salved vessel, cargo and freight, 269,700*l.* In an action of salvage the sum of 10,000*l.* was awarded. The defendants appealed on the ground that the amount was excessive:—

Held by the Court of Appeal, that the amount awarded could not be supported without doing injustice to those whose property was salved, for, in the Court below, undue weight had been given to the value of the salved property, and the absence of serious danger, either to the salving or to the salved vessel, had not been sufficiently recognized. The award was, therefore, reduced to 6000*l.*

APPEAL by defendants, the owners of the steamship *Port Hunter*, her cargo and freight, from a decision of Bargrave Deane J., awarding the sum of 10,000*l.* to the plaintiffs, the owners, master, and crew of the steamship *Ambon*, for salvage services.

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The case is reported on the question of the grounds on which a Court of Appeal acts in reducing the amount of a salvage award.

The *Ambon* is a steel screw steamship belonging to the Stoomvart Maatschappij Nederland, of 3597 tons gross register, fitted with triple expansion engines of 249 horse power nominal working up to 1600 effective, and manned by a crew of forty-six hands. She runs regularly in the Eastern trade, and, at the time of the services in question, was in the course of a voyage from Java to Amsterdam with a general cargo. Her value was 36,250*l.*, cargo 45,375*l.*, and freight at risk 6375*l.*—total 88,000*l.*

On December 16, 1909, the wind at the time being moderate from the south-east, with a southerly swell, and a current setting to the eastward, the *Ambon* was proceeding up the Red Sea, a little north of the Farsan Islands, when about 5.30 A.M. those in charge observed, about three miles distant, a blue light about four points on the port bow. On a second blue light being shewn, the *Ambon* headed in that direction, and after proceeding for two miles two red lights were observed which turned out to be on the foremast of the *Port Hunter*, a steel screw steamship of 4062 tons gross register, fitted with engines of 475 horse power nominal, and manned by a crew of forty-two hands. She belonged to the Milburn Line and was in the course of a voyage from Adelaide to London with a cargo of wool, lead, and zinc. She had broken down and become helpless owing to the nut and key pin of the propeller coming off, fracturing the boss, and jamming the propeller hard up against the stern post. The vessel was built in 1905, and her value, in her damaged condition, was 40,000*l.*, cargo 215,237*l.*, and net freight at risk 14,468*l.*—total 269,705*l.*

After an exchange of signals, the *Port Hunter* lowered a boat, and her chief officer came on board the *Ambon*. He informed those in charge of the damage to the propeller and that they had been working since midnight in endeavouring to make the propeller secure, but had failed. The chief officer returned to his ship, and subsequently the second officer came on board the *Ambon*, bringing with him a copy of the following agreement which the master of the *Ambon* had prepared in

duplicate, and which the master of the *Port Hunter* had signed :—

" Red Sea, Lat. 18° 4′ N. Long. 40° 9′ E.

" The undersigned G. P. Baum, master of the Dutch steamship *Ambon* (tonnage, horse power, and owners), and R. Whitehead, master of the English steamship *Port Hunter* (tonnage and horse power), being in this moment in distress under the following circumstances : (damage to propeller)—agree about the following :—

" That the former shall tow the latter up to Suez Roads weather and circumstances permitting. The remuneration of the said service shall be arranged in Holland between the owners or other parties whom it may concern. Red Sea, December 16, 1909."

Towage commenced about 10 A.M., the vessels being connected by two wire hawsers, one supplied by each ship. On the morning of the 17th the *Port Hunter's* wire parted, and during the manœuvres, and boat work by the *Port Hunter*, to get it fast again, the *Ambon's* hawser parted. About midday towage recommenced with the wire of the *Ambon*, and a manilla of the *Port Hunter*, but both hawsers parted. The boat of the *Port Hunter* was again used, and the connection being re-established, towing began about 5 P.M., the south-east wind in the meantime having increased, and the swell become greater. During the 18th the towage proceeded without incident; but in the early part of the 19th the wind came from the north, and increased during the day with some swell. On the 21st the weather got worse, and the wind further increased in force. By this time the vessels were some distance up the Red Sea and met with a westerly current. About 10.15 A.M. on the 22nd the vessels passed Newport Rock, and an hour afterwards the *Port Hunter* was safely anchored in Suez Roads, after a towage of 833 miles at an average speed of over six knots.

The plaintiffs alleged that they had lost three days and been put to heavy expense in rescuing the *Port Hunter* "from a position of great danger in a very dangerous locality, and she might have become a total loss with her cargo."

The defendants admitted that salvage services had been successfully rendered, and that it was a great advantage that the

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Ambon had the necessary coal to tow such a distance, but they denied the alleged danger and contended that "at the time the *Port Hunter* was fallen in with, and during the whole of the towage, she was right in the track of vessels in a locality where steam vessels able to render efficient service were constantly available. The weather, save for a few hours in the Gulf of Suez, was fine throughout, the sea smooth, and the swell, as is usual in the Red Sea, inconsiderable."

The case was tried on March 5, 1910, with the assistance of two of the Elder Brethren of the Trinity House, and the following judgment was pronounced :—

BARGRAVE DEANE J. This is a salvage service rendered in the Red Sea last winter, in the month of December, and it is a service rendered by a vessel representing a total value of 88,000*l.* to another vessel representing a total value of 269,700*l.*, and, therefore, the values are very large. Although I quite accept the suggestion and the ruling of the Privy Council on this question that large values must not be taken too much into account, yet, still, you are entitled to take them into account in a fair way. Something has been said about the current in the Red Sea. I have tried one or two cases of this sort in the Red Sea, and this question of current is always one that is dealt with, but the result in my mind, from what I have heard to-day and on other occasions, is this, that the current depends a good deal on the state of the wind, and after it has been setting for a certain time in one direction, whether it is that the water having reached its boundary is set back again so as to cause a set of current in the opposite direction, or not, I do not know, but it looks very much as though that was the fact, and that the currents, although they do set one way and then another, very often counteract one another. Still, it is an unknown quantity, and an unknown danger, and I am entitled to take it into account, to a certain extent, in dealing with the question of salvage. The towage lasted over six days and nights, it was rendered by a vessel which fortunately had a very good supply of coal on board, and it was rendered to a vessel which was hopelessly broken down. There are some vessels which break

down which are capable of repairing their own damage, but this is not a case of that sort. The propeller was damaged by reason of the nut and key pin of the propeller dropping off, fracturing the boss, and the propeller itself had got adrift, and there were no means of putting it right. Therefore it was essential that she should be towed to some place where the damage could be repaired, or she could lay up until that part of the machinery was sent out to her, as in this case, so as to make the vessel capable of proceeding on her voyage. I do not lay very much stress on the evidence of either side, beyond the fact of the time occupied, the position of the vessels when the towage started, and the fact that when you get up towards the northern end of the Red Sea you invariably meet with a northerly wind, as is shewn in the log in this case, and then a certain amount of sea, making the towage rather more difficult in this sense, that it was harder, and the fact is shewn in the log by reason of the reduction in speed.

I have got to deal as best I can with the question of the amount of the award, which is always a difficult one, and the best decision that I can arrive at is that I award the sum of 10,000*l.*

July 11. *Laing, K.C.*, and *Lewis Noad*, for the appellants (defendants), owners of the *Port Hunter*, her cargo and freight. It is submitted that the sum of 10,000*l.*, decreed by way of salvage award in the Court below, is excessive, and ought to be very substantially reduced in order to represent a proper remuneration for services which, though admittedly salvage, scarcely exceeded ordinary towage.

There is no doubt that the *Port Hunter*, besides being the larger vessel of the two, was in a helpless condition, having lost the use of her motive power, and that she required towage assistance, but it was essentially towage, and was so regarded under the agreement signed by the respective masters. The kind of assistance rendered by the *Ambon* was readily available, as the *Port Hunter* was, at the commencement, and during the towage, right in the track of vessels, in a locality where steam vessels are constantly passing. The distance towed was, according to the plaintiffs, not more than 833 miles. It was performed at an

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average speed of over six knots, so that the weather conditions were favourable, and as the full speed of the salving steamer was ten knots, and she was bound the same way, the utmost time lost did not exceed three days. The boat work, for passing lines to establish, and re-establish, communication when the ropes parted, was performed by the *Port Hunter*, and the blue lights, which originally attracted the notice of the *Ambon*, were not signals of distress, but to call the attention of the passing traffic. The allegations made by the plaintiffs as to the great danger to which the *Port Hunter* was exposed are not consistent with the facts, and were therefore not taken seriously into consideration in the Court below, but it is evident from the judgment that the learned judge was led away by the large values to exaggerate the amount of the award. The values are, no doubt, large, but the value of the ship and cargo saved is only one element in considering the amount to be awarded—see per Lindley L.J. in *The City of Chester* (1)—and this Court will not hesitate to interfere and diminish the award, if, after carefully considering the facts, and after giving every possible weight to the view of the judge, this Court is of opinion that the amount is so large as to be unjust to the owners of the ship which has been in distress: see per Lord Esher M.R. in *The Accomac*. (2) In the case of a derelict, where the value was 190,000*l*., the Judicial Committee of the Privy Council reduced an award of 30,000*l*. to 18,000*l*., and in the judgment the following passage occurs:—"The rule seems to be that, though the value of the property salved is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of proportion to the services actually rendered": *The Amérique*. (3)

Aspinall, K.C., and *A. D. Bateson*, for the respondents (plaintiffs), the owners, master, and crew of the steamship *Ambon*. This appeal is based solely on the ground that the award is unreasonably large, but such appeals are rarely successful, for "where the Court of first instance has not misapprehended the facts of the case, and has not erred in point of principle, and therefore the

(1) (1884) 9 P. D. 182, at p. 202. (2) [1891] P. 349, at p. 354.
(3) (1874) L. R. 6 P. C. 468, at p. 475.

success of the appeal against its award depends entirely upon proving that its wide discretion in all questions of amount of reward has been so wrongly exercised in the assessment of the sum awarded, that the Court of Appeal ought to interfere, the appellant has a peculiarly hard task before him": see Kennedy on the Law of Civil Salvage, 2nd ed. (1907), pp. 164, 165. The learned Lord Justice adds: "It has even been said by the Privy Council, in the case of one such appeal (*The Carrier Dove* (1)), that their Lordships would not enter into the question of quantum where there has been nothing to shock the conscience, nothing gross or extravagant," and though this statement, viewed in the light of subsequent decisions by the same tribunal, may be a little too strong, still in the case of *Master and Owners of S.S. Baku Standard* v. *Master and Owners of S.S. Angèle* (2) the Privy Council laid down that the amount of compensation awarded by the Court below will not be reduced unless it appears to be grossly in excess of what is right; in other words, it seems that, in order to interfere with the discretion of the Court below, this Court must differ very widely as to what is due to the salvors.

In *The Werra* (3), Lord Hannen, when awarding 7000*l.* on a total value of 240,500*l.*, said: "The first thing to be considered is the value of the property saved; by that I do not mean that it is to be taken as absolutely the most important element, but that it is the subject-matter in respect of which the action arises. It is the fund which has to be dealt with and to be divided between the owners and the salvors who have acquired a claim upon it."

[BUCKLEY L.J. Is the word "divided" a correct expression with reference to a salvage award?]

No, perhaps not; the salvors have acquired a claim upon the property as stated in the concluding words of the sentence.

In the case now before the Court the chief points justifying the learned judge in making a substantial award seem to be: (1.) The large value, which is a very important, though not necessarily the dominant, feature. (2.) The salvage services were rendered in a narrow waterway with uncertain, because irregular, currents, and, if the *Port Hunter* had not been promptly picked up, she

(1) (1863) 2 Moo. P. C. (N.S.) 243, at p. 254.

(2) [1901] A. C. 549.

(3) (1886) 12 P. D. 52.

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might have drifted ashore. This was an element of considerable danger. (3.) The *Ambon* was a very efficient instrument for the work, as the master of the *Port Hunter* recognized when thanking the master of the *Ambon* for the able way in which the services had been rendered, and in his letter from Suez Roads to his owners of December 28, 1909, he says: "It is not many steamers that would have had the necessary coal to tow such a distance, and several passed without taking any notice of us." According to the evidence the *Ambon* was three days longer than usual in the Red Sea, and burned three times thirty-three tons per day, that is, ninety-nine tons more, and on arrival at Port Said her coals were exhausted. (4.) The risk of collision, that is, the danger incurred by the salving steamer in approaching a disabled vessel to get the ropes fast. It is stated in the chief officer's log of the *Port Hunter* that when attempting to establish connection the "*Ambon* in passing alongside bumped on port side forward." (5.) The principle involved in a salvage service of "no cure no pay" is an inducement to the Court to make a liberal award for services successfully rendered, as, otherwise, vessels running in a line will not salve property. It is, therefore, important, on the ground of public policy, to be generous. (6.) The delay involved, for the *Ambon* was not able to keep to her advertised date. This was a serious matter for the owners of the salving vessel, and, in fact, threw them out in their arrangements for a regular service.

Laing, K.C., in reply. The alleged collision must have been very slight, as there is no mention of it in the plaintiffs' log or in their pleadings. The risk of two ships fouling one another is almost always present in a salvage service, but that risk largely depends on the weather, and it is admitted that the wind and sea were moderate.

In considering the values it must be remembered that the cargo of the salving vessel was carried on the usual terms, that is, that the carrying ship should have liberty to tow, and, therefore, there was no risk of breach of contract to be taken into consideration.

This Court will not only reduce an award, where it differs to a

substantial amount from the sum fixed by the judge in the Court below, but, since *The Toscana* (1), the usual course applicable to appeals will be followed, and the successful appellant will have his costs.

VAUGHAN WILLIAMS L.J. There is no real dispute in this case as to a proposition which seems at one time to have been doubtful. It is plain now, and both sides assume it is plain, that we can review the amount which has been ascertained by the Court of first instance. In the case of *The Accomac* (2) I find the following statement in the judgment of Lord Esher M.R.: "It seems to have been urged that we are to act in these salvage appeals in accordance with the same rule that we act upon with regard to setting aside the verdict of a jury on a question of fact, namely, that we are not to interfere with it unless the amount is so large, or so small, that no reasonable person could fairly arrive at that sum. That is not the rule. If, after carefully considering the facts, and after giving every possible weight to the view of the judge, we think it greatly in excess, and so greatly as to be unjust to the owners of the ship which had been in distress, we are bound to alter the amount by lessening it. In the same way if, after having given that consideration to it which I have mentioned in the other case, and after having given all the weight which we think we can to the opinion of the judge who tried the case, we think the amount awarded to the salvors is so small as really to be unjust to them, we are bound to alter the amount." Starting from that point we have to consider whether the amount arrived at in the Court below was or is an amount which can be supported without doing any injustice to those whose property was salved.

I shall now try, as far as it is possible, to arrive first at the principle which has been acted upon heretofore. I agree—and I think both counsel said the same thing—that it is very difficult to lay down an affirmative rule as to how you are to arrive at the amount of salvage. There are a good many rules laid down which do enable you to say that you are to take this or that and the other matter into consideration. There is ample authority

(1) [1905] P. 148. (2) [1891] P. 349, at p. 354.

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to shew you that you must take the value of the salved vessel into consideration. It is something that you really have to start with, but you have also to take into consideration a number of other matters. You have to take into consideration first the danger in which the salved ship was at the moment when the salvage services began. That seems to have been laid down with tolerable certainty. Again, you have obviously to take into consideration the danger which was incurred by the salving ship through rendering these services. You have, of course, to take into consideration a number of other matters which I do not propose to be rash enough to try and catalogue; but I think one may safely lay down that there are certain matters which, if the evidence shews that they were present, ought to be taken into consideration in arriving at the amount of compensation; and if you find that there has been an omission to take such matters into consideration—an omission which has either increased or diminished the salvage award—then you are able to say that here is a case in which no difficulty arises as to the question whether the Court of Appeal may review the salvage or not, because you have a case where there is a departure in the judgment from recognized principles as to this or that matter being a matter which can or cannot be properly taken into consideration. I ventured to suggest, in the course of the argument, to counsel for the respondents—who, as I understand, assented to the proposition which I put forward—that in a case where matters which ought to be taken into consideration one way or the other—like the danger to the salved ship and the danger to the salving ship, or the risk to the master and crew—are matters which are rather negative, you will not give so large an amount of compensation as to leave no margin whatever for an increase of compensation in a case where matters like danger to the salving vessel and her master and crew have been proved. You must make your total amount such a sum that it would leave a margin which you would have given in case these matters had been proved.

I propose to say very few words about the facts of this particular case, because they are so little in dispute. I should like to refer to the fact that an agreement was made between

the two masters. This was the agreement: [The learned Lord Justice read the agreement already set out, and continued.]

That is an item of evidence which would lead me to what I believe is the same conclusion as that which was arrived at by the learned judge, namely, that there was no serious danger in this case, either to the salving or to the salved vessel; and when I come to look at the judgment—it is a very short judgment—it begins with dealing with the current in the Red Sea, and although the learned judge recognizes the fact that there are such currents, and that they may cause a certain amount of danger, according to the circumstances, he says, "Still, it is an unknown quantity, and an unknown danger, and I am entitled to take it into account, to a certain extent." He has taken it into account to a certain extent, and no doubt it has to a certain extent increased the award. Then he deals with the towage, and says it lasted over six days and nights; and, after referring to the damage, says: "Therefore it was essential that she should be towed to some place where the damage could be repaired, or she could lay up, until that part of the machinery was sent out to her, as in this case, so as to make the vessel capable of proceeding on her voyage. I do not lay very much stress on the evidence of either side, beyond the fact of the time occupied, the position of the vessels when the towage was started, and the fact that when you get up towards the northern end of the Red Sea you invariably meet with a northerly wind, as is shewn in the log in this case, and then a certain amount of sea, making the towage rather more difficult in this sense, that it was harder, and the fact is shewn in the log by reason of the reduction in speed."

Now, I take it from that judgment that the learned judge himself was of opinion that this was a case in which there was no considerable danger at all in the matter, making it very nearly a question of a towage, causing delay to the towing steamer, plus expense. If you start with the value of the vessel, and then make deductions by leaving out these things, which I say are not proved in this case, and which the decided cases shew, if proved, would materially increase the salvage, one obviously has a great deal to deduct in a case where there was really no danger to

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either ship or to the master and crew. In these circumstances I think, with all respect to the learned judge, that he has failed to make those deductions which one ought to make when one starts with the value of the salved ship as the main consideration. The value of the ship was agreed. In these circumstances we think the salvage award ought to be reduced to 6000*l.*, and the appellants will be entitled to the costs of the appeal.

BUCKLEY L.J. There are cases which come before this Court on appeal, in which this Court refuses to interfere on the ground that the matter was one in the discretion of the judge, and that unless the judge has gone wrong on a question of principle this Court will not review his discretion.

The present case is not entirely one of this kind, but is, I think, comparable to those of which I have spoken. The matter to be determined is: What is the proper amount to be allowed for salvage services? This is so largely a matter for judicial discretion that, unless the judge has gone wrong on a matter of principle, so far as any principle can be laid down in a salvage case, this Court will, I think, decline to interfere. It is not impossible, I think, to lay down certain general principles. I should state them thus: In the first place the Court is generous in these matters, for this reason, that it is desirable to encourage salvage services. Secondly, in order to estimate the amount which is to be awarded you are not to consider simply the price at which those services could have been bought in the market. Thirdly, regard is to be had both to the value of the ship that is salved and to the value of the salving ship. Fourthly, regard is to be had to the danger to which each ship was exposed. Fifthly, regard is to be had to the delay to which the salving vessel has been put. Sixthly, the Court regards the fact that the salving vessel has accepted a task for which she gets nothing if she fails.

Here I have a chattel—the salving vessel—which was worth 37,000*l.* She was employed for six days in all. Her loss of time was three days out of the six. The salvage allowed by the judge is 10,000*l.*, say 25 per cent. on her value, for, as a matter of time, three days' service. The amount thus stated seems extravagantly large. To stop there, however, would be wrong.

I must regard also the value of the ship that was salved. It was a very large value, 270,000*l*. That ought to increase the figure, but if a judge were to say simply : "I shall give so much per cent. on the 270,000*l*. for the salvage," he would go wrong. I must consider the amount of danger in which the two ships lay; what probability there was that the vessel salving would be, or might be, lost if she rendered the services; what chance there was that the vessel salved would be lost if she did not receive assistance. All these things have to be considered. Lastly, the salving vessel has to accept a position in which she will get something if successful, but nothing if she fails; and therefore she is not likely to enter upon these services unless she is generously treated. Those being the relevant considerations, all I can get out of the judgment is this—it commences by saying that the vessel salved is of very large value, and then goes on to discuss the question of danger, and, as I understand, attributes not much, but some, importance to the question of danger. The time occupied is twice mentioned, and in the concluding sentence of his judgment, the learned judge simply, as it seems to me, is finding that it is a towage contract, and that towards the northern end of the Red Sea a northerly wind prevails, and a certain amount of sea, making the towage rather more difficult in the sense that it was harder, a fact shewn by the log, by the reduction of speed.

Out of that judgment I can only get this, that there was a towage service rendered, under circumstances of more or less difficulty, to a vessel of very large value. I think the learned judge has attributed too much importance to the value of the ship salved, and has not paid sufficient attention to the fact that the services were rendered under circumstances of really no danger, or no substantial danger. He would have gone wrong, I think, in principle if he had said, "Well, there being no danger, and only a towage service, I shall give only the market price for towage." Here he has gone wrong in the other direction, because he has said, "Although this was a mere towage service, inasmuch as the vessel is of very large value I shall make a large award." I think the award which he has made is too large and should be reduced to 6000*l*.

C. A. 1910

THE PORT HUNTER.

THE PRESIDENT (SIR SAMUEL EVANS). I agree with the learned Lords Justices. I think the learned judge of the Court below must have given undue weight to the value of the vessel salved in arriving at the very large sum of 10,000*l.* as the salvage award.

I think it is very important, on the ground of public policy, that the Admiralty Court should be generous in its awards. The rendering of such services should not be discouraged but encouraged, and greatly encouraged. I only wish to add that, apart altogether from the well-known willingness, courage, and devotion of our seafaring men in helping others in difficulties, I have no fear that the amount which we are now allowing—6000*l.* for six days—will in any way discourage the rendering of salvage services in the future.

Appeal allowed with costs. Award reduced to 6000*l.*

Solicitors for appellants (defendants), owners of the *Port Hunter: William A. Crump & Son.*

Solicitors for respondents (plaintiffs), owners, master, and crew of the *Ambon: Clarkson & Co.*

T. L. M.

In the Estate of EMIL HEERMAN.

1910
Oct. 31.

Administration—Creditor—No known Relative of the Intestate—Action pending at Death—Assets requiring immediate Attention—Court of Probate Act, 1857 (20 & 21 Vict. c. 77)—Grant to Creditor under s. 73—Citation of Next of Kin (if any) dispensed with.

Where an intestate, who had stated, during his lifetime, that he had no relatives, died pending proceedings instituted on his behalf for the recovery of a sum due to him, leaving assets requiring immediate attention and sundry debts owing, the Court granted administration to a creditor, passing over the next of kin (if any), under s. 73 of the Court of Probate Act, 1857.

Motion for grant to a creditor dispensing with citation of next of kin (if any).

Emil Heerman, late of Enville Cottage, Addlestone, in the county of Surrey, died there on September 24, 1910, a bachelor without any known relation, and intestate.

The only known estate of the deceased consisted of twenty-eight dachshund dogs of the estimated value of 4*l.* each, household furniture and effects of the nominal value of 10*l.*, and cash in the bank 9*l.*, making a total of 131*l.* In addition thereto the deceased claimed a sum of 25*l.*, an action for the recovery of which had been commenced by the applicant as his solicitor during his lifetime.

From the affidavit of the applicant it appeared that the deceased at the time of his death was justly and truly indebted to him in the sum of 10*l.* for professional services rendered in the capacity of solicitor to the said deceased, and that no part of such sum had since been received by the applicant or by any person on his behalf, and that the applicant held no security for the same.

There were also various small debts owing by deceased at the time of his death for medical attendance, nursing, and sundries, amounting in all to 27*l.* 10*s.*, in addition to which the applicant had since the death of the intestate been paying for the keep of the dogs before mentioned, and there was also said to be an undertaker's bill owing in respect of the funeral expenses of the intestate amounting to 25*l.*

1910

HEERMAN, IN THE ESTATE OF.

The landlady of the deceased, to whom a small debt was owing, stated in an affidavit, filed in support of the motion, that the deceased always gave her to understand that he had no relations whatever, either in this country or abroad.

Inquiries made and advertisements inserted since the death had not resulted in any one being discovered as next of kin.

The Solicitor to the Treasury, to whom notice of the present application had been given, had intimated his intention not to interfere in the matter.

R. M. Middleton (*Stuart Bevan* with him), for the applicant. It is desired to avoid the expense of a formal citation of the next of kin (if any), having regard to the nature of the assets, the amount of the debts, and the fact that the deceased himself stated that he had no relatives.

[BARGRAVE DEANE J. Is there any precedent for this ?]

The Court has dispensed with citation under special circumstances: *In the Goods of Frost.* (1) Another course would be to make a grant ad colligenda bona. *In the Goods of Ashley* (2) is an authority for this form of grant in a case like the present. The applicant would undertake to pay any surplus assets into Court. The debts must be paid by somebody.

BARGRAVE DEANE J. I think the right order to make in this case is to grant the applicant administration under s. 73, passing over the next of kin (if any), the applicant undertaking to pay any surplus assets into Court. The Treasury Solicitor will then be protected, and the administrator will be in a position to carry on the pending action for recovery of some of the assets.

Solicitor : *E. Stuart Richards.*

(1) [1905] P. 140. (2) (1890) 15 P. D. 120.

H. D. G.

THE END.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1st, 1910, will be as follows:—

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[1910] 1 Ch. [1910] 2 Ch.

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Where an intestate, who had stated, during his lifetime, that he had no relatives, died pending proceedings instituted on his behalf for the recovery of a sum due to him, leaving assets requiring immediate attention and sundry debts owing, the Court granted administration to a creditor, passing over the next of kin (if any), under s. 73 of the Court of Probate Act, 1857. IN THE ESTATE OF HEERMAN.
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DIVORCE—*Channel Islands, Civil Marriage in the—Foreign Law—Practice—Evidence.*

Where, in the case of a marriage in the Channel Islands, the marriage ceremony has been celebrated elsewhere and otherwise than in a church in accordance with the rites and ceremonies of the Established Church of England and Wales, evidence of the validity of the marriage according to the local law is still required. WESTLAKE *v.* WESTLAKE (OTHERWISE WILLIAMS - - **Bargrave Deane J. 167**

2. —— *Co-respondent—Husband's Petition—Person named and cited as Co-respondent—Scotsman—Foreign Domicil, Allegiance, or Residence of Co-respondent—Liability for Costs or Damages—Discretionary Power of Court to dismiss Co-respondent from Suit—Refusal—Co-respondent's Motion dismissed with Costs.*

Whatever it is that determines the jurisdiction of this Court with regard to co-respondents, that jurisdiction does not depend upon the domicil of the co-respondent, nor is it to be

DIVORCE—*continued.*

determined by the question whether the co-respondent is or is not a British subject.

So far as a co-respondent is concerned, the citation corresponds with what would have been, before the Matrimonial Causes Act, 1857, came into operation, the writ in an action for criminal conversation.

Service of the citation and sealed copy of the petition upon a co-respondent, if out of England, places him on the same footing with regard to jurisdiction as a defendant properly served with a writ out of the jurisdiction under Order XI. in the King's Bench or Chancery Division.

The claim against a co-respondent in a divorce suit is merely a personal claim for money, and is not complicated with questions of international law arising out of status, as in the case of a petitioner and respondent.

Although a judgment, following on a verdict for damages in a divorce suit in this Court, could not be enforced against a foreigner in a foreign country, it might possibly be enforced against a Scotsman or an Irishman, in Scotland or Ireland, by means of the Judgments Extension Act, 1868.

The enactment in s. 42 of the Matrimonial Causes Act, 1857, providing for service of any person at any place is only a municipal law in favour of those who sue in this Court; and the Legislature thereby does not concern itself with the question whether an order against a co-respondent for payment of damages or costs in a proceeding begun by citation served abroad would or would not be enforceable as a foreign judgment in another country. The object of the provision is that this Court may make the order and may enforce it against any property which the person against whom the order is made may have within its own jurisdiction or within its own reach.

As the Act gives power to serve anybody as co-respondent anywhere, it gives jurisdiction to make any order against the co-respondent, and to issue process of execution to enforce the order in this country; and this can be done without in any way affecting any international comity or offending any international susceptibilities. RAYMENT *v.* RAYMENT AND STUART. CHAPMAN *v.* CHAPMAN AND BUIST
Samuel Evans, Pres. 271

3. —— *Costs—King's Proctor—Unsuccessful Intervention — Practice — Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2.

Sect. 2 of the Matrimonial Causes Act, 1878, confers upon the Court a discretion as to the costs of an intervention, whether by the King's Proctor or a member of the public, and the King's Proctor stands in precisely the same position as to costs as any other intervener, except that the Treasury may recoup him for any costs which he may pay to a successful petitioner under order of the Court.

There is no practice not to order the King's Proctor to pay the costs of an unsuccessful intervention, unless he has acted unreasonably in intervening.

Westcott v. *Westcott*, [1908] P. 250, approved and followed.

DIVORCE—*continued.*

Higgins v. *Higgins*, [1910] P. 1, reversed.
Carter v. *Carter*, [1910] P. 4, affirmed. HIGGINS *v.* KING'S PROCTOR. KING'S PROCTOR *v.* CARTER - - - - - - **C. A. 151**

4. —— *Costs—Wife's Costs—Practice—Stay of Proceedings until Payment—Husband's Petition—Jury discharged without Verdict—Proposed Retrial—Jurisdiction—Divorce Court Rule* 158.

At the trial of a petition by a husband for divorce, the jury disagreed and were discharged without giving a verdict. Before and during the hearing the wife had obtained the usual orders for security for her costs of the trial, and a sum of 45*l.* had been paid into Court. The husband now proposed to have the petition retried, though he had not paid the balance of the wife's taxed costs not covered by the 45*l.* in Court:—

Held, that there was jurisdiction to stay all further proceedings by the husband until the whole of the wife's taxed costs had been paid or secured, and security given for the wife's further costs of the retrial.

Joseph v. *Joseph*, (1897) 76 L. T. 236, approved. KEMP-WELCH *v.* KEMP-WELCH AND CRYMES - - - - - - - **C. A. 233**

5. —— *Custody—Child above the Age of Sixteen—Adultery of Mother—Order against Child—Wishes of Child—Jurisdiction.*

The Court has power, as between the father and mother, to order that one of the parents shall have the custody of the child during minority, but it cannot make an order against a child of sixteen years of age contrary to the child's wishes, unless the child is a ward of Court.

Thomasset v. *Thomasset*, [1894] P. 295, distinguished.

Adultery by the wife which justifies a divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle her to access to, or even to the custody of, her daughter, who is under sixteen. STARK *v.* STARK AND HITCHINS - - - - - - **C. A. 190**

6. —— *Hearing—Suspicion as to Truth of Petitioner's Evidence — Adjournment — Papers sent to King's Proctor—Right of King's Proctor to intervene or to shew Cause before Decree Nisi—Practice.*

At the hearing of a petition by the wife for dissolution of marriage, her counsel, in opening, and the petitioner, in the witness-box, stated that she had committed adultery, but asked the Court to exercise its discretion in her favour; but the Court, having a very strong suspicion that the petitioner's case was in material respects untrue, adjourned the further hearing, at the same time directing that all necessary papers in the matter should be sent to His Majesty's Proctor, in order that, under the directions of the Attorney-General, the said Proctor should instruct counsel to argue before the Court all questions in relation to the cause which the Court might deem it expedient to have fully argued, and, for that purpose, to take such steps as might be deemed necessary or expedient.

DIVORCE—*continued.*

Upon motion by the King's Proctor for directions:—

Held that, as the Court could not compel the Attorney-General to issue his fiat, the case would have to remain in the reserve list until that list should be called over and dealt with in the ordinary course.

Hudson v. *Hudson and Poole*, (1875) 1 P. D. 65, questioned. JACKSON *v.* JACKSON
Bargrave Deane J. 230

7. —— *Nullity — Insanity — Decree Nisi — Application on behalf of Respondent for an Allowance — Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1.

An application on behalf of a respondent for an allowance to be made by the petitioner is not confined or limited to the time when the decree nisi is pronounced, but may be made then or at any time up to and including the date when the decree is made absolute; and such allowance, if ordered for a monthly or weekly sum, under s. 1, sub-s. 2, of the Matrimonial Causes Act, 1907, may not only be discharged, modified, suspended, or revived under the proviso (*a*) of that sub-section, but is also liable to be increased under proviso (*b*) of the same sub-section.

It is open to the Court, by consent, to make an order at the time of the decree nisi, and to embody it therein, dealing with the whole question of settlement and allowance. K. *v.* K. (OTHERWISE R.) - **Bargrave Deane J. 140**

8. —— *Settlement, Variation of—Restraint on Anticipation — Remarriage — Matrimonial Causes Act*, 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 3—*Jurisdiction—Remarriage after Petition but before Order—Practice.*

On a petition for variation of settlement, after decree absolute for dissolution of marriage, the Court has full power under the Matrimonial Causes Act, 1859, s. 5, as extended by the Matrimonial Causes Act, 1878, s. 3, to vary such settlement in such a way as to override the restraint upon anticipation clause and put an end to the restraint, notwithstanding the remarriage of the innocent party before an order of the Court is made, though after petition filed. CHURCHWARD *v.* CHURCHWARD
Samuel Evans, Pres. 195

9. —— *Settlements, Variation of—Petition by Party against whom Decree pronounced—Consent—Order.*

The Court made an order for variation of the marriage settlement at the instance of the respondent in a nullity suit, the petitioner in the suit being stated to be a consenting party to the order. SUART *v.* SUART.
Samuel Evans, Pres. 246

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ECCLESIASTICAL LAW—*Faculty—Jurisdiction—Movable Communion Table of Oak to have inserted therein on its top Surface a square Block 24 inches square of Stone.*

In this case in 1902 a faculty was granted by the Chancellor of the diocese of Ely sanctioning the introduction into the church of St. Mary, Madingley, in the county of Cambridge and diocese of Ely, from which church a stone altar had been removed under a previous faculty, of a new movable Communion table of oak; the table to have inserted therein on its top surface a square block 24 inches square of stone, to be placed in such a position that each end of the block should be equidistant from the end of the table, and the front of the block to be four inches from the front of the table and eight inches from the hind part thereof. *In re* ST. MARY, MADINGLEY, in the Consistory Court of Ely (not reported) - - - **[1910] P. 23, n.**

2. —— *Faculty — Jurisdiction — Refusal of Faculty for Communion Table with Marble Slab forming the Top of the same.*

A faculty cannot legally be granted for a Communion table with a marble slab forming the top of the table though the rest of the table is of wood. RECTOR, &C., OF HAYES *v.* FULFORD **Consistory Court of London 18**

3. —— *Jurisdiction—Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86), *s.* 3—*Criminal Suit by Letters of Request — Incumbent "concerning whom there may exist scandal or evil report as having offended against the laws ecclesiastical" —Application for Admission of Articles charging Offence of occasioning Scandal by Immoral Acts justiciable under the Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32)—*Rejection of Articles—Citation—Description of Judge in Citation as "Official Principal and Auditor of the Chancery Court of York"—Objection to Style of Judge not sustained.*

The offence of occasioning scandal within the 3rd section of the Church Discipline Act, 1840, cannot be entertained in a criminal suit by Letters of Request under that Act against a clerk in holy orders of the Church of England in any case where the acts which appear to have occasioned the scandal are immoral acts within the 75th Canon of 1603 and constitute an offence in respect of which the respondent has not been proved guilty; the Courts appointed to have jurisdiction under the Clergy Discipline Act, 1892, being the only Ecclesiastical Courts having jurisdiction to inquire as to the truth of the immoral acts or offences so occasioning the scandal.

The 3rd section of the Church Discipline Act, 1840, read with the 13th section of the same Act, provides that in every case of any clerk in holy orders of the Church of England who may be charged with any offence against the laws ecclesiastical or concerning whom there may exist scandal or evil report as having offended against the laws ecclesiastical it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment to—in the circumstances mentioned in the last-mentioned section—send the case by Letters of Request to the Court of Appeal of the province, to be there

ECCLESIASTICAL LAW—*continued.*

heard and determined according to the law and practice of that Court.

The 2nd section of the Clergy Discipline Act, 1892, read with the 12th section of that Act, provides, inter alia, that if a clergyman in holy orders in the Church of England is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and not being a question of doctrine or ritual, he may be prosecuted under that Act (subject to the disallowance by the bishop of the diocese of vague and frivolous charges); the expressions immoral act, immoral conduct, and immoral habit including such acts, conduct, and habits as are proscribed by the 75th and 109th Canons of 1603. By the 14th section of the same Act, the Church Discipline Act, 1840, except certain sections as to procedure not material to this case, shall be repealed as respects any proceeding instituted after the passing of the Act of 1892 for an offence which can be prosecuted under that Act. The articles brought in in a criminal suit by Letters of Request sent to the Chancery Court of York by one of the bishops of the Northern Province under the 13th section of the Church Discipline Act, 1840, alleged, inter alia, that by the laws, constitutions, and canons ecclesiastical of this realm, and more particularly by virtue of the 75th Canon of 1603, moral life and sober conversation are required in ministers, who shall have always in mind that they ought to excel all others in purity of life and should be examples to the people to live well and christianly under pain of ecclesiastical censures; that during the period of two years next preceding the commencement of the proceedings in the suit there had been concerning the respondent, a clergyman in holy orders of the Church of England and the incumbent of a living in the diocese of the bishop signing the Letters of Request, scandal or evil report as having offended against the laws ecclesiastical above mentioned; and that the promoter would pray that on due proof of the premises the respondent should be deprived ab officio et a beneficio or be otherwise canonically punished. The promoter applied that the articles so brought in might be admitted to proof.

The judge of the Chancery Court of York refused to admit any of the articles, being of opinion that the offence of scandal with which it was sought to charge the respondent could not be adjudicated upon by the Court, inasmuch as such scandal was not cognizable apart from the acts which caused the scandal, which acts constituted offences under the Clergy Discipline Act, 1892, and could not be dealt with under the Church Discipline Act, 1840. BOWMAN *v.* LAX - - **Chancery Court of York 300**

4. —— *Repulsion from Holy Communion—Lawful Cause—Open and Notorious Evil Liver — Marriage with Deceased Wife's Sister — Criminal Suit — Monition — Prohibition — 1 Edw. 6, c. 1, s. 8—Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw. 7, c.* 47), *s.* 1.

Sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, validates a marriage between

ECCLESIASTICAL LAW—*continued.*
a man and his deceased wife's sister for all purposes, whether the marriage is contracted within or without the realm, and whether before or after the date of the passing of the Act.

The immunity granted by the first proviso in the section to any clergyman of the Church of England from any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if the Act had not been passed, is limited to matters connected with the solemnization of such a marriage and does not extend to the performance of the general duties of his office.

Since the passing of the Act marriage with a deceased wife's sister is not a lawful cause within s. 8 of 1 Edw. 6, c. 1, for repelling the parties to the marriage from Holy Communion.

Where, therefore, the Arches Court of Canterbury admonished a clergyman of the Church of England for having, since the passing of the Deceased Wife's Sister's Marriage Act, 1907, repelled the parties to such a marriage from Holy Communion, as being, by reason of their marriage and cohabitation, open and notorious evil livers, and to refrain from so repelling them in future :—

Held by the Divisional Court (Bray J. dissenting) and by the Court of Appeal, that there was no ground for a writ of prohibition to restrain the Ecclesiastical Court from proceeding further in the matter of the monition. THE KING *v.* DIBDIN - - - - - **C. A. 57**

EVIDENCE — Civil marriage in the Channel Islands—Foreign law - - - **167**
See DIVORCE. 1.

—— Divorce—Hearing—Suspicion as to truth of petitioner's evidence—Adjournment —Right of King's Proctor to intervene or to shew cause before decree nisi **230**
See DIVORCE. 6.

FACULTY—Jurisdiction.
See under ECCLESIASTICAL LAW.

FISHING—Collision—Drift-net fishing—Incumbered by nets—"Special circumstances" —Lights—Standing by - - **215**
See SHIPPING. 8.

FOREIGN DOMICIL—Divorce—Foreign domicil, allegiance, or residence of co-respondent—Scotsman—Liability for costs or damages - - - - - . **271**
See DIVORCE. 2.

FOREIGN LAW—Civil marriage in the Channel Islands—Evidence - - - **167**
See DIVORCE. 1.

GRANT—Probate—Administration—Disappearance of administrator — Motion — Revocation—Fresh grant to creditor **169**
See PROBATE. 2.

GRANT OF ADMINISTRATION.
See under ADMINISTRATION.

HEARING—Divorce—Suspicion as to truth of petitioner's evidence—Adjournment— Right of King's Proctor to intervene or to shew cause before decree nisi - **230**
See DIVORCE. 6.

HOLY COMMUNION—Repulsion from—Marriage with deceased wife's sister—Criminal suit—Monition—Prohibition - **57**
See ECCLESIASTICAL LAW. 4.

INFANT—Custody—Child above the age of sixteen—Adultery of mother—Order against child—Wishes of child—Jurisdiction - - - - - - **190**
See DIVORCE. 5.

INSANITY.
See under LUNACY.

INTESTACY — Probate — Disappearance of administrator—Motion — Revocation— Fresh grant to creditor - - **169**
See PROBATE. 2.

JUDICATURE ACT—Collision—Damage—Both ships to blame—Limitation of liability
See SHIPPING. 3. **249**

JURISDICTION—Church discipline — Criminal suit by Letters of Request—Objection to style of judge not sustained - **300**
See ECCLESIASTICAL LAW. 3.

—— Divorce.
See under DIVORCE.

—— Faculty.
See under ECCLESIASTICAL LAW.

JURY — Legitimacy declaration — Petition — Right to trial by jury - - - **143**
See LEGITIMACY DECLARATION.

KING'S PROCTOR—Costs—Unsuccessful intervention - - - - - - **151**
See DIVORCE. 3.

—— Hearing—Suspicion as to truth of petitioner's evidence — Adjournment — Right of King's Proctor to intervene or to shew cause before decree nisi **230**
See DIVORCE. 6.

LADING—Bill of—Ship.
See under SHIPPING.

LANDING STAGE — Collision — Damage — "Vessel"—Preliminary acts - **207**
See SHIPPING. 4.

LEGITIMACY DECLARATION—*Petition—Legitimacy Declaration Act*, 1858 (21 & 22 *Vict.* c. 93), *ss.* 4, 11—*Mode of Trial—Right to Trial by Jury—Discretion of Court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 36—*Jury refused.*

The judge has absolute discretion as to the mode of trial of the issues arising on a petition for a declaration of legitimacy under the Legitimacy Declaration Act, 1858, and, in exercising such discretion, the judge will have regard to the balance of convenience. Where the

LEGITIMACY DECLARATION—*continued.*
issues for trial involved, besides possible questions of character affecting one of the parties, the reading of a mass of evidence, taken on various commissions, the minute and careful examination of numerous documents, and probably questions of admissibility of evidence, which might prejudice the minds of a jury:—
Held, that the difficulty of deciding fairly any question of character or credit that might arise could not outweigh the inconvenience, delay, and possible miscarriage of justice which the trial of such complicated matters before a jury was likely to involve, and that an application by the petitioner for trial by jury should be refused. SACKVILLE - WEST *v.* ATTORNEY-GENERAL (LORD SACKVILLE CITED) **Bigham, Pres. 143**

LETTERS OF REQUEST—Criminal suit by — Jurisdiction — Church discipline — Objection to style of judge not sustained
See ECCLESIASTICAL LAW. 3 **300**

LIMITATION OF LIABILITY — Collision — Damage—Both ships to blame - **249**
See SHIPPING. 3.

LUNACY—Nullity—Decree nisi—Application on behalf of respondent for an allowance
See DIVORCE. 7. **140**

MARRIAGE—Channel Islands, Civil marriage in the—Foreign law—Evidence - **167**
See DIVORCE. 1.

—— Deceased wife's sister, Marriage with — Repulsion from Holy Communion—Criminal suit—Monition—Prohibition
See ECCLESIASTICAL LAW. 4. **57**

—— Divorce.
See under DIVORCE.

MASTER AND SERVANT—Collision — Negligence of defendants' servant causing original damage—Liability - **38**
See SHIPPING. 11.

MATRIMONIAL CAUSES ACTS—Divorce.
See under DIVORCE.

—— Legitimacy declaration.
See under LEGITIMACY DECLARATION.

MERCHANT SHIPPING.
See under SHIPPING.

MONITION—Repulsion from Holy Communion —Marriage with deceased wife's sister —Criminal suit—Prohibition - **57**
See ECCLESIASTICAL LAW. 4.

NEGLIGENCE—Collision—Damage — Tug and tow—Negligence of tug—Non-liability of tow - - - - - - **199**
See SHIPPING. 6.

—— Collision — Negligence of defendants' servant causing original damage — Liability - - - - - - **38**
See SHIPPING. 11.

NETS—Collision—Drift-net fishing — Incumbered by nets — "Special circumstances"—Lights—Standing by - **215**
See SHIPPING. 8.

NEXT OF KIN—Court of Probate Act, 1857—Grant to creditor under s. 73—Citation of next of kin (if any) dispensed with
See ADMINISTRATION. **357**

PILOTAGE — Collision — Singapore Harbour—Inevitable accident—Onus of proof—Compulsory pilotage - - - **28**
See SHIPPING. 9.

PRACTICE—Discontinuance of action before appearance—Counter-claim - **25**
See SHIPPING. 12.

—— Divorce.
See under DIVORCE.

—— Probate.
See under PROBATE.

PROBATE— *Costs — Practice — Taxation — Quantum — Interference with Discretion of Registrar.*
As a general rule the Court will not interfere with the decision of the taxing registrar upon a mere question of quantum. IN THE ESTATE OF OGILVIE. OGILVIE *v.* MASSEY **C. A. 243**

2. —— *Intestacy—Administration—Practice —Disappearance of Administrator — Motion—Revocation—Fresh Grant to Creditor.*
The original administrator of a deceased intestate disappeared and could not be traced. Fresh assets having become payable to the legal personal representative of the deceased, and the next of kin, other than the original administrator, declining either to renounce or to apply for a grant, the Court revoked the original letters of administration which had been granted to the deceased's brother, and made a fresh grant at the instance of a creditor. IN THE ESTATE OF FRENCH
Samuel Evans, Pres. 169

—— Citation—Administration — Creditor — No known relative of the intestate—Action pending at death — Assets requiring immediate attention - - - **357**
See ADMINISTRATION.

PROHIBITION—Holy Communion, Repulsion from—Marriage with deceased wife's sister — Criminal suit — Monition — Prohibition - - - - - **57**
See ECCLESIASTICAL LAW. 4.

PROOF—Collision—Inevitable accident—Onus of proof—Compulsory pilotage—Singapore Harbour - - - - - **28**
See SHIPPING. 9

REMARRIAGE — Variation of settlement — Restraint on anticipation—Jurisdiction —Remarriage after petition but before order - - - - - - **195**
See DIVORCE. 8.

RESTRAINT ON ANTICIPATION—Variation of settlement — Jurisdiction — Remarriage after petition but before order - - - - - - - **195**
See DIVORCE. 8.

REVOCATION — Intestacy — Administration — Disappearance of administrator — Motion—Fresh grant to creditor - **169**
See PROBATE. 2.

RULES OF THE SUPREME COURT, 1883, Order XIX. (Pleading generally), r. 28
See SHIPPING. 4. **207**

—— **Order XXI. (Defence and Counter-claim), r. 16** - - - - - - - **25**
See SHIPPING. 12.

—— **Order XXVI. (Discontinuance), r. 1** - **25**
See SHIPPING. 12.

—— **Order LXXII. (General Rules), r. 2; Appendix O (22.)** - - - **207**
See SHIPPING. 4.

SALVAGE—Award—Grounds for an Appeal Court reducing the amount - - **343**
See SHIPPING. 17.

SCOTSMAN—Divorce—Foreign domicil, allegiance, or residence of co-respondent—Liability for costs or damages - **271**
See DIVORCE. 2.

SERVANT—Master and.
See under MASTER AND SERVANT.

SETTLEMENTS—Variation of—Divorce—Petition by party against whom decree pronounced—Consent—Order - **246**
See DIVORCE. 9.

—— Variation of—Restraint on anticipation—Remarriage - - - - - **195**
See DIVORCE. 8.

SHIPPING—*Arbitration—Ship—Berth Note—Arbitration Clause—"Dispute arising at loading ports"—Stay of Proceedings.*

By a berth note it was agreed between the plaintiffs, shipowners of Cardiff, and the defendants, grain merchants of London and Marioupol, that the plaintiffs' steamship should proceed to the Sea of Azov, and there load from the defendants' nominees a cargo of grain, and discharge the same in the United Kingdom or on the Continent, the defendants to do the stevedoring at rates as per margin, and "in case of any dispute arising at loading ports under this berth note, it is to be submitted to the Rostof-on-Don Bourse Court of Arbitration whose decision is to be final."

The vessel loaded a cargo of wheat, barley, and rye at Marioupol, and, for stevedoring, the defendants charged 40 roubles per thousand chetverts in accordance with the tariff in the margin of the berth note, and deducted the amount from advance freight. On the accounts being received by their London agents the plaintiffs contended that the defendants had overcharged them by not reckoning, in the

SHIPPING—*continued.*

customary way, the number of poods for barley and rye to the chetvert, and they commenced a county court action against the defendants to recover the difference:—

Held by a Divisional Court (Sir Samuel Evans, President, and Bargrave Deane J.), affirming the decision of the county court judge, that all proceedings in the action must be stayed with a view to arbitration under the clause in the berth note, as the matter in dispute was "What are the proper charges for stevedoring at Marioupol?" and this dispute arose where the stevedoring was done, and where the charges in dispute were made. THE DAWLISH
Div. Ct. 339

2. —— *Bill of Lading — Incorporation of Conditions of Charterparty—Demurrage—Arbitration Clause.*

Goods were shipped under a bill of lading by which they were deliverable to the shipper or to his assigns, "he or they paying freight for the said goods with other conditions as per charterparty," and in the margin was written in ink "Deck load at shipper's risk and all other terms and conditions and exceptions of charter to be as per charterparty including negligence clause."

The charterparty provided that the cargo should be discharged by the steamer at port of destination, in the usual manner, with customary steamer despatch, according to the custom of the port, "but if, through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day," and "Any dispute or claim arising out of any of the conditions of this charterparty shall be adjusted at port where it occurs, and same shall be settled by arbitration":—

Held by a Divisional Court (Sir Samuel Evans, President, and Bargrave Deane J.), affirming an order of a county court judge, that all proceedings must be stayed in an action, commenced in the county court by the shipowner against the holder for value of the bill of lading, for demurrage alleged to have been incurred at the port of discharge, as the arbitration clause in the charterparty was incorporated in the bill of lading.

Hamilton v. *Mackie*, (1889) 5 Times L. R. 677, distinguished. THE PORTSMOUTH
Div. Ct. 293

3. —— *Collision—Damage — Both Ships to blame—Limitation of Liability—Admission on Pleadings—Cargo Owner—Division of Loss—Rule in force in the Court of Admiralty—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

The rule laid down in *The Milan*, (1861) Lush. 388—namely, that where both ships are in fault for a collision, the owners of cargo on one ship can only recover against the owners of the other ship one half of the damage they have sustained—is a rule in force in admiralty within the meaning of s. 25, sub-s. 9, of the Judicature Act, 1873. THE DRUMLANRIG - **C. A. 249**

4. —— *Collision—Damage—Landing Stage —"Vessel" — Preliminary Acts — Practice —*

Rules of the Supreme Court, 1883, *Order* XIX., *r.* 28; *Order* LXXII., *r.* 2; *Appendix O* (22.).

The plaintiffs, owners of a landing stage in the river Mersey, brought an action against the defendants, owners of a steamship, to recover the amount of damage sustained by them in consequence of the steamship striking the landing stage, and, on the application of the plaintiffs, the district registrar directed that preliminary acts should be filed. This order was affirmed by Bargrave Deane J. The defendants appealed:—

Held by the Court of Appeal, that the landing stage was not a "vessel" within the meaning of the Rules of the Supreme Court, 1883, Order XIX., r. 28, by which preliminary acts are to be filed in actions for "damage by collision between vessels," and, therefore, the order directing the filing of these documents must be set aside, notwithstanding any wider practice with reference to preliminary acts in "causes of damage" alleged to exist under the Admiralty Court Rules of 1859, and to be saved by the provisions of Order LXXII., r. 2, for the rules of 1859 are included in the list of repealed rules in Appendix O to the Rules of the Supreme Court, 1883, and, therefore, any such alleged practice, if existing thereunder, has been abrogated. THE CRAIGHALL - - - - - - **C. A. 207**

5. —— *Collision—Damage—Sound Signals.*

Notwithstanding the alleged unwillingness of the Court to infer negligence from the fact that fog signals proved to have been sounded in the vicinity were not heard, failure to hear such signals may be sufficient, by itself, to justify a finding that those in charge of the vessel concerned were not keeping a good look-out. THE CURRAN - - - - - - **C. A. 184**

6. —— *Collision—Damage—Tug and Tow—Negligence of Tug—Non-liability of Tow.*

Those in charge of a barge, in tow of a tug, are entitled to assume that the tug will be navigated with ordinary care, caution, and maritime skill so as to keep the tow clear of danger, and, therefore, where those in charge of a tug, on entering the Mersey with a barge in tow, negligently allowed the tug, under the influence of wind and tide, to drift to leeward, so that those in charge of the barge, though making reasonable efforts by porting the helm to get to windward, failed to avoid the danger, and the barge ran into and sank a lightship, the tug was held alone to blame.

As against third parties, the legal relationship, in respect of master and servant, subsisting by virtue of contract between those in charge of tug and tow, is not material to the inquiry whether either or both tug and tow are to blame for a collision between the tow and a third vessel. THE W. H. NO. 1 AND THE KNIGHT ERRANT - - - - - - - **C. A. 199**

7. —— *Collision—Damage—Warship—Loss of Use during Repairs—Claim in the Nature of Demurrage.*

A Danish warship was just completing a long winter training cruise when she came into collision, in the Sound, with a British vessel, and

in an action of damage by collision, brought by the Danish Government against the owners of the British vessel, the British vessel was found alone to blame. In ordinary course, the warship would have been docked and overhauled, and not put into commission until three months had elapsed, and would then have been used for a summer training cruise. Before the expiration of the three months the repairs necessitated by the collision were executed, and the vessel ready to be put into commission. At the reference for the assessment of the damage sustained by the warship a claim of 1500*l.* for the loss of the use of the vessel was disallowed. On objection to the report:—

Held, that the principles laid down in *The Mediana*, [1900] A. C. 113, with reference to damages for deprivation of the use of a chattel, were applicable to the case of a warship, and, therefore, as, by reason of the wrongful act of the defendants, the Danish Government had not for a period of twenty-two days—during which the repairs rendered necessary by the collision were being executed—had the vessel under their control for use if they wanted her, the registrar was directed to assess the damages on the basis of that portion of the three months, thereby reducing the amount claimable under the head of deprivation of the use of the vessel to something under 400*l.* THE ASTRAKHAN

Bargrave Deane J. 172

8. —— *Collision—Drift-net Fishing—Incumbered by Nets—"Special Circumstances"—Lights — Standing by — Regulations for Preventing Collisions at Sea, arts.* 9 (*b*) (1906), 20, 21, 26, 27 *—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 419, 422.

A sailing drifter and a steam drifter came into collision, at night, in the North Sea at a time when the sailing vessel, under reduced canvas owing to the heavy weather, and exhibiting the side lights for a vessel under way, was proceeding towards her fishing ground at the rate of about four knots, heading to the southwestward. The steam vessel, with her engines stopped, and moving through the water to the E.S.E. before the wind, under her mizzen, at something less than a knot, was engaged in shooting her nets, and as these nets were "partly in the water" she was exhibiting the two white lights prescribed by art. 9 (*b*) (1906) of the regulations for preventing collisions at sea in the case of vessels fishing with drift nets; but the lower of the two lights was not in the direction of the nets as required by the rule. Those in charge of her, seeing that a collision with the sailing vessel was imminent, attempted to avoid it by moving the engines astern, but, after a few revolutions, the propeller fouled the nets and the vessel became helpless. In an action of damage by collision brought by the owners of the sailing vessel against the steam vessel:—

Held, that the sailing vessel was alone to blame, as she ought to have kept out of the way, for the other vessel, though a steamer, was incumbered by her nets, and, therefore, there were "special circumstances," within the meaning of art. 27 of the regulations, rendering it not

SHIPPING—*continued.*

necessary for her, under art. 20, to keep out of the way of the sailing vessel. Secondly, that though the direction of the nets of the steam vessel were not properly indicated by the position of the lower of the two lights carried by her, this could not by any possibility have caused or contributed to the collision, and, therefore, she was not to blame for an infringement of the regulations under s. 419 of the Merchant Shipping Act, 1894. Thirdly, that, owing to the fouling of her propeller, the steam vessel was not in a position to render assistance to the other vessel, and, therefore, the presumption of fault raised by s. 422 of the same statute was rebutted. THE PITGAVENEY - **Samuel Evans, Pres. 215**

9. —— *Collision—Inevitable Accident—Onus of Proof—Compulsory Pilotage—Singapore Harbour—Straits Settlements Ordinances* (1879), *No.* 8, *ss.* 1, 12; (1885) *No.* 5, *s.* 4; (1905) *No.* 7, *ss.* 20, 23; (1905) *No.* 8, *ss.* 21, 32.

The defendants' steamship, whilst proceeding, in daylight, out of the harbour of Singapore, ran into and sank the plaintiffs' vessel at her moorings. The defence set up was inevitable accident due to an abnormal current, and, in the alternative, compulsory pilotage :—

Held, that the defendants were liable, for they had not succeeded in establishing the existence of the abnormal current relied on, and, therefore, the onus of proof being on them, they had failed to shew that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill. Secondly, that the defence of compulsory pilotage was not available, for the repeal of s. 12 of the Straits Settlements Ordinance No. 8 of 1879 has rendered pilotage at Singapore no longer compulsory. THE POLYNÉSIEN

Bigham, Pres. 28

10. —— *Collision — Navigation of Goole Reach, River Ouse—Local Practice to Swing—Helm Signal—Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.

The plaintiffs' steamship, proceeding up the river Ouse with a strong flood tide, neglected, on approaching the bend in Goole Reach, to swing and dredge up stern first, with the result that, not being under proper control, she was carried, at an excessive speed, into collision with the defendants' steamship, which was coming down the reach, and which contributed to the collision by starboarding after giving a port helm signal :—

Held by the Court of Appeal, affirming the judgment of the Court below, that both vessels were to blame, the plaintiffs' vessel for excessive speed due to failing to observe the seamanlike precaution of swinging in the reach, in accordance with the local practice; the defendants' vessel for wrongly starboarding, and failing to obey art. 28 of the regulations for preventing collisions at sea by indicating her helm movement with the appropriate whistle signal. THE FRANKFORT - - - - - **C. A. 50**

11. —— *Collision—Negligence of Defendants' Servant causing original Damage — Negligence of Plaintiff's Servant causing subsequent Loss—*

SHIPPING—*continued.*

Servant acting in Dual Capacity—Liability for consequential Damage.

In an action of damage by collision, it appeared that a trawler belonging to the defendants was so negligently handled by her temporary master that, in taking up her berth in Grimsby Dock, she fouled a water boat, and drove that boat against the quarter of the plaintiff's trawler, which was lying moored in the dock, and which, owing to leakage resulting from the collision, ultimately sank.

The defendants, whilst admitting liability for the damage caused by the original contact, denied that they were liable for the subsequent foundering of the plaintiff's vessel, on the ground that their temporary master, after the collision, and knowing that it had happened, had resumed his duties as watchman on board the plaintiff's trawler, and had negligently failed to discover and stop the inflow of water which caused the trawler to sink.

In the Court below it was held that the initial negligence of the servant of the defendants was the cause of the disaster, and, therefore, the defendants were liable for the whole loss :—

Held by the Court of Appeal, that the exercise of reasonable care by the servant of the plaintiff, on the resumption of his duties as watchman, would have avoided the consequential loss, and, therefore, the defendants were only liable for the damage caused by the original contact. THE EGYPTIAN - - - - - - **C. A. 38**

12. —— *Collision—Practice—Arrest of Defendants' Ship—Discontinuance of Action before Appearance—Counter-claim—Rules of Supreme Court, Order XXI., r.* 16; *Order XXVI., r.* 1.

On the same day that a collision occurred in the Bristol Channel between a French and a British vessel the owners of the French vessel (which was sunk) issued a writ in rem and arrested the British vessel at Cardiff. On the following day the warrant was withdrawn, and the British vessel released on notice given that the action was discontinued. Later in the day telegrams passed between the respective solicitors, and on the next day the solicitors for the owners of the British vessel wrote that their clients "have a counter-claim for the damage to their ship, with which we intend to proceed," and, after entering an appearance to the action, they applied for an order that the owners of the French vessel should file a preliminary act with a view to the owners of the British vessel delivering their counter-claim :—

Held that, even if the application was right in form, it must be refused, as a counter-claim could not be set up to an action which had been "wholly discontinued" within the meaning of the Rules of the Supreme Court, Order XXVI., r. 1. THE SALYBIA - - **Bigham, Pres. 25**

13. —— *Collision—Sailing Vessel and Steam Trawler—"Proceeding"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 9 (1906), *sub-s.* (*k*); *art.* 20.

A steam trawler fishing in the daytime in the vicinity of the Dogger Bank, and indicating her occupation to an approaching sailing vessel

SHIPPING—*continued.*

by the display of a basket, in accordance with art. 9 (1906), sub-s. (*k*), of the regulations for preventing collisions at sea, was run into and sunk by the sailing vessel owing to the negligence of those in charge of that vessel in not keeping a good look-out. It was contended on behalf of the sailing vessel that, though she was to blame, the trawler was also to blame for not using her steam to keep out of the way of the sailing vessel under art. 20 of the above regulations, by which "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel" :—

Held, that the trawler was not to blame, for, at the material time, she was engaged in the operation of hauling in her trawl. In such circumstances she was an incumbered vessel unable, until her trawl was up, to move her engines ahead or astern without risk of fouling her propeller. She was, therefore, not a steam vessel "proceeding" so as to involve risk of collision within the meaning of art. 20.

The Jennie S. Barker, (1875) L. R. 4 A. & E. 456, distinguished.

The Tweedsdale, (1889) 14 P. D. 164, followed.
THE GLADYS - - - **Bigham, Pres. 13**

14. —— *Collision—Sailing Vessel engaged in Trawling—Shewing Flare-up in sufficient Time—Regulations for Preventing Collisions at Sea, art.* 9 (1906) (*d*), *sub-s.* 2.

A steamship proceeding about midnight, at a speed of nearly nine knots, through a fleet of vessels fishing off the north coast of Cornwall, ran down and sank one of them, which had her regulation white fishing light up, and was, at the material time, lying hove to, engaged in hauling in her trawl. The lights of the steamship were first observed at some considerable distance, and when it was noticed by those on board the trawler that the steamship was heading for them, a white flare-up light was shewn where it could best be seen, the distance between the two vessels being then about 300 yards. The Court found that the steamship was alone to blame for not keeping out of the way, and also :—

Held that the flare was shewn "in sufficient time to prevent collision" within the meaning of art. 9 (1906) (*d*), sub-s. 2, of the regulations for preventing collisions at sea. THE PICTON
Bigham, Pres. 46

15. —— *Collision—Sound Signals — Helm Movement to counteract Effect of reversing Engines—Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.

By art. 28 of the regulations for preventing collisions at sea, a steam vessel under way, in taking any course authorized or required by the rules in respect of another vessel in sight, shall indicate that course by the appropriate sound signal :—

Held, that a steam vessel having sounded three short blasts to indicate that "my engines are going full speed astern" did not infringe the rule by omitting to sound one short blast on hard-a-porting, as this helm action was to prevent her head canting to starboard under the reverse action of the engines. THE ABERDONIAN - - - **Bargrave Deane J. 225**

SHIPPING—*continued.*

16. —— *Collision—Steam Trawler engaged in Trawling—Steamship crossing—Effect of Exhibition of Triplex Light—Giving way—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 9 (1906) (*d*) (1.), 19, 21, 27.

By art. 19 of the regulations for preventing collisions at sea, 1897, "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." By art. 27, "In obeying and construing these rules, due regard shall be had to . . . . any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger" :—

Held by the Court of Appeal, that the exhibition by a steam vessel "engaged in trawling" of the special lights, rendered compulsory by art. 9 (1906) (*d*) (1.) of the above regulations, was an indication that "special circumstances" existed within the meaning of art. 27, rendering the trawler incapable of obeying art. 19, and, therefore, casting upon the other crossing steam vessel the duty of keeping out of the way.

The reasoning in *The Tweedsdale*, (1889) 14 P. D. 164, so far as applicable, followed.

The Craigellachie, [1909] P. 1, disapproved.
THE GROVEHURST - - - - **C. A. 316**

17. —— *Salvage—Award—Grounds for an Appeal Court reducing the Amount.*

The defendants' steamship, from Adelaide to London with a cargo of wool, broke down in the Red Sea, owing to damage to her propeller. She was picked up by the plaintiffs' steamship, from Java to Amsterdam with a general cargo, and was towed in six days about 830 miles to a safe anchorage in Suez Roads. The weather was fine, except towards the end of the towage, when the usual northerly wind and some sea were encountered, and during part of the towage varying currents were met with. The salving vessel lost three days and incurred some expense. The values were large, that of the salving vessel, cargo and freight, 88,000*l.*, and that of the salved vessel, cargo and freight, 269,700*l.* In an action of salvage the sum of 10,000*l.* was awarded. The defendants appealed on the ground that the amount was excessive :—

Held by the Court of Appeal, that the amount awarded could not be supported without doing injustice to those whose property was salved, for, in the Court below, undue weight had been given to the value of the salved property, and the absence of serious danger, either to the salving or to the salved vessel, had not been sufficiently recognized. The award was, therefore, reduced to 6000*l.* THE PORT HUNTER
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WILL—*Not conditional—Dispositions not dependent on a Specific Event—Document pronounced for.*

Where a will is made in terms subject to the happening of a certain event, that event must

WILL—*continued.*

occur to render the will operative; whereas, if the possibility of an event happening is stated merely as the reason for making the will, it becomes operative whether the event happen or not.

For instance, if a man write in his will "If I die to-morrow my will is" so and so, his death must occur on the morrow to make the will operative; but if the words be "Lest I die to-morrow" . . . . the document will be operative whether he die or not on the morrow.

The question whether a testamentary document is conditional or not depends on the wording of the document itself, and, if it can be said that the language used therein is ambiguous, extrinsic evidence is admissible to assist the Court in clearing up the ambiguity.

The Court admitted evidence of declarations by the testator, made down to within a short time before he died, to the effect that the will in question was all right, and that his wife would take all he had to leave. IN THE ESTATE OF VINES. VINES *v.* VINES - **Bigham, Pres. 147**

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